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John T. Evrard

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COMMENT

HUMAN RIGHTS IN THE SOVIET UNION: THE POLICY OF DISSIMULATION*

*We sit for a while in the kitchen—
The white sweet smell of kerosene.
Sharp knife and a loaf of bread.
If you like, let the primus burn out,
And if not, gather string
To tie the basket before dawn,
Because we leave for the station
Where no one must find us out.*

—Osip Mandelshtam (1891–ca. 1938)

The author of this poem lived and died during the Stalinist terror,¹ but the fear of totalitarianism that is expressed continues to characterize the experience of many individuals in the Soviet Union today. Although the Soviet legal system in the past two decades has been modified to curb the excesses of the Stalinist era, violations of human rights persist. One measure of increased protection has been acceptance by the Soviet government of interna-

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1. This period encompassed the 1930's and postwar years. From 1932-1933, six to seven million people died in an artificially created famine, more than one million were shot, and more than ten million died in concentration camps. Most victims were accused of counterrevolutionary crimes. Moreover, from 1934 on large numbers of people were tried and summarily executed without right of appeal by three-man tribunals. Many others were sent to concentration camps simply for being relatives of "enemies of the people." Beginning in 1938, torture could be performed legally by state officials. These actions, which virtually extinguished human rights in the Soviet Union, represented a sharp reversal of a previous trend toward greater individual rights. The Bolsheviks justified these harsh conditions as necessary to the creation of the Soviet state as a bulwark for an ideology destined to transform human nature throughout the world. This vision also formed the basis for the sweeping redistribution of political, legal, economic, and social power in the hands of the state. Reddaway, *Theory and Practice of Human Rights in the Soviet Union*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 115, 118 (Kommers & Loescher eds. 1979). For a fictional account of imprisonment during the Stalinist era, see A. SOLZHENITSYN, *THE FIRST CIRCLE* (1974). See also Weisberg, *Solzhenitsyn's View of Soviet Life in The First Circle*, 41 U. CHI. L. REV. 417 (1976).

Following Stalin's death in 1953, the national reign of terror abated so that by 1958 the Soviet criminal codes reflected an attitude of greater respect for procedural due process in criminal trials. This evolution is attributable to increasing Soviet political stability. Acts of treason and crimes against the state were greatly reduced, due in part to the physical liquidation of counter-revolutionary elements, and in part to the U.S.S.R.'s acquisition of sufficient military strength to resist external aggression. Further, the economy was increasingly industrialized and agriculture increasingly collectivized. Osakwe, *Due Process of Law Under Contemporary Soviet Criminal Procedure*, 50 TUL. L. REV. 266, 269-70 (1976) [hereinafter cited as Osakwe, *Due Process*].

tional human rights obligations, which through domestic law it is committed to implement. This commitment is demonstrated by various statutory enactments and provisions of the Constitution of 1977.² These recent obligations are interpreted, however, within a framework of state policy as promulgated by two overlapping entities—the Communist Party of the Soviet Union (CPSU) and the Supreme Soviet, the highest organ of state authority,³ which is dominated by the Party.⁴ Moreover, both the Party and the government officially regard the U.S.S.R. as still evolving within the period of socialist revolution.⁵ Consequently, human rights have not been guaranteed to persons and groups deemed inimical to the policies and comprehensive plan⁶ of the State and to the ultimate attainment of Com-

2. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, *adopted* at the Seventh (Special) Session of the Supreme Soviet of the U.S.S.R., Ninth Convocation, on Oct. 7, 1977 [hereinafter cited as CONSTITUTION].

3. The Constitution declares the Supreme Soviet to be the "highest body of state authority of the U.S.S.R." *Id.* art. 108.

4. See J. HOUGH & M. FAINSOD, *HOW THE SOVIET UNION IS GOVERNED* 362-63 (1979) [hereinafter cited as HOUGH]. The overlap between "party" and "government" occurs because "[t]he vast majority of party members work full-time for some governmental ministry, and the leading officials of the governmental agencies are members not only of the party but of the leading party organs as well." *Id.* at 362.

5. The Soviet leadership officially states that the revolution is not yet complete and, therefore, contemporary Soviet society is at an imperfect although necessary stage in the construction of Communism. The function of law at this stage is primarily to guide society toward this goal. R. DAVID & J. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 162-63 (1978) [hereinafter cited as DAVID]. See note 6 *infra*. According to Marxist-Leninist theory, the early stages in the development of society are marked by class antagonism in which the ruling class controls the tools of production and creates both the state and its law in order to perpetuate its domination over the exploited classes. Law is thus an instrument in the hands of exploiters and is used to maintain social and economic inequality. Human history, it is argued, is the record of the struggle by one class against another to wrest control of the tools of production. *Id.* at 158-60. As presented by one Soviet commentator, the Marxist-Leninist analysis makes it possible to predict a society in which this struggle ceases and law becomes altogether unnecessary. V. CHKNIKVADZE, *THE STATE, DEMOCRACY AND LEGALITY IN THE U.S.S.R.* 74 (1972). For this to occur, the tools of production must become the property of the collectivity, which is a class alliance between the proletariat (the vanguard of working people) and various strata of non-proletarian working people. The aim of this alliance is the complete overthrow of capital and the development of the institution of Socialism. *Id.* Only then, it is believed, will exploitation and class antagonism disappear, and in its place, a fraternal, communist society ultimately emerge. J. HAZARD, *COMMUNISTS AND THEIR LAW* 425-26 (1964) [hereinafter cited as HAZARD, COMMUNISTS]. See DAVID, *supra*, at 160-61. Until the advent of global Communism, the theory maintains, certain countries must emerge as "dictatorships of the proletariat," *i.e.*, states in which the ruling class of proletarian workers keeps the class enemy, the former exploiters, under control. Feldbrugge, *The Study of Soviet Law*, 4 REV. SOCIALIST L. 201, 204 (1978) [hereinafter cited as Feldbrugge, *Study*]. The socialist conception of law as an instrument of social evolution is conveniently suited to this situation. Indeed, the justification of the power monopoly within the U.S.S.R. (the CPSU) and other socialist states rests upon the proposition that as "purposeful agents" of the proletariat they have assumed the role as the leading force in the struggle to attain Communism. *Id.* at 208.

6. All enterprises in the Soviet Union exist in principle to execute the centralized plan for national economic development. They must achieve the goals imposed upon them by the plans

munism. From the standpoint of Western legal consciousness, the State's disregard for the rights of these individuals and groups not only conflicts with the human rights prescriptions embodied in the major international instruments ratified by the Soviet Union, but also are inconsistent with the Socialist functions of the Soviet legal system.⁷

This Comment analyzes the human rights practices of the U.S.S.R. from the perspectives of international law and Soviet law. It ascertains the specific content of the Soviet Union's human rights obligations as evidenced by the sources of international law, and it evaluates the extent to which Soviet law and practice has or has not met these obligations.⁸ As will be shown, the

and are not permitted to act beyond statutory and state-imposed limitations. DAVID, *supra* note 5, at 215-16. Since the Party dominates the Soviet government, the plan is to a great extent affected by changing policy decisions within the Party and by the ultimate authority of top Party organs. See HOUGH, *supra* note 4, at 362. This interrelationship of Party and government is the key device by which the CPSU maintains control over the legal and political systems of the U.S.S.R. Vanneman, *The Hierarchy of Laws in the Communist Party-State System in the Soviet Union*, 8 INT'L LAW. 285, 289-90 (1974) [hereinafter cited as Vanneman]. The philosophical justification for the all-pervasive influence of the CPSU perhaps lies with the Marxist-Leninist principle that the Party serves as the guardian of immutable truth both within itself and for the people. Therefore, the Party presumes that it is entitled to exercise its prerogative not only over the plan for economic development but in all matters affecting Soviet life, because its members possess superior consciousness of the necessities imposed by nature for man's survival. Codevilla, *Marxist-Leninism and Fundamental Freedoms*, 4 REV. SOCIALIST L. 215, 217 (1978). But see Lock, *The Legal Metaphor in Marxism-Leninism*, 4 REV. SOCIALIST L. 229 (1978) (arguing that a coherent doctrine of Marxism-Leninism does not exist in reality and can only be understood as an eclectic combination of elements of diverse origin).

7. The functions of socialist legality are encompassed within four categories. The first is that law provides an organizational framework for society and thereby appoints, defines, and fixes legal relationships. Felbrugge, *Study*, *supra* note 5, at 205. The second function of law is to provide solutions to conflicts by prescribing the application of legal rules in certain situations. *Id.* at 206. Law also serves an educative function; it points to the delinquent nature of behavior that capitalist societies comprehend as normal. Thus, law is an instrument for the transformation of society in accordance with the ideals of Communism. DAVID, *supra* note 5, at 163. A final acknowledged goal of Soviet criminal law is that of combatting crime through the use of punishment. It is also emphasized, however, that this should be replaced by the education and resocialization of the wrongdoer. While punishment effectively deters crime, it is viewed as exerting adverse effects on the convict and his family. Kelina, *Substantive Criminal Law in THE CRIMINAL JUSTICE SYSTEM OF THE U.S.S.R.* 130, 161-62 (M. Bassiouni & V. Savitski eds. 1979) [hereinafter cited as BASSIOUNI & SAVITSKI]. This formalization of legal objectives should not obscure the fact that in a socialist society law cannot be dissociated from Marxist-Leninist doctrines, for these doctrines serve as the philosophical and moral guideposts for the political and lay communities. The resolution of any legal dispute should in theory be consistent with this morality. DAVID, *supra* note 5, at 164. Indeed, the CPSU enacted a code of communist morality as part of its program in 1961. HAZARD, *COMMUNISTS*, *supra* note 5, at 11.

8. See, e.g., Feldbrugge, *Study*, *supra* note 5, at 213. The author argues that claims by the Soviet system of advances in the protection of human rights can be judged through a detailed examination of provisions in Soviet law which correspond to its international obligations. *Id.* For a discussion of the Soviet Union's implementation of human rights obligations prior to adoption of the 1977 Constitution, see Uibopuu, *The International Legal Obligations of the U.S.S.R. for the Protection of Individuals*, 14 CO-EXISTENCE 264 (1977) [hereinafter cited as Uibopuu, *Individuals*].

Soviet legal system fails to implement its international obligations with respect to the treatment of Jews, other ethnic, religious and linguistic minorities, aliens, and political dissidents. Finally, this Comment considers responses available to the world community to induce the Soviet Union to comply with its human rights commitments.

SOVIET HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW

The salient inquiry in international law no longer is whether human rights exist,⁹ but whether there are rules of international law with specific legal content that may be deemed binding on the states.¹⁰ To this end, the position of the Soviet Union with respect to international law must be understood. Of the primary sources of international law—conventional law (treaties and conventions), customary law, and general principles¹¹—the

9. For articles which discuss the development of positive human rights norms under international law, see Higgins, *Conceptual Thinking About The Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978) [hereinafter cited as Higgins, *Conceptual*]; Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31 (1978) [hereinafter cited as Humphrey]; Robertson, *Human Rights: A Global Assessment*, 53 NOTRE DAME LAW. 15 (1977) [hereinafter cited as Robertson, *Global*]; van Dijk, *International Law and the Promotion and Protection of Human Rights*, 24 WAYNE L. REV. 1529 (1978) [hereinafter cited as van Dijk].

10. Henkin, *The Internationalization of Human Rights*, 6 COLUM. U. PROCEEDINGS OF THE GENERAL EDUCATION SEMINAR 5, 6-7 (1977). The primary responsibility for the protection of human rights is imposed upon the states for implementation through domestic law. Acceptance of this indirect enforcement scheme has led some governments to assert that direct international implementation is unnecessary and constitutes interference with national sovereignty. Humphrey, *supra* note 9, at 34-35.

11. General principles constitute a subsidiary source of international law. These are drawn from the legal systems of nations and are indicative of a legal policy which is recognized as binding even though not formally codified. J. BRIERLY, *THE LAW OF NATIONS* 62-63 (6th ed. 1963) [hereinafter cited as BRIERLY]. The crucial element in determining the existence of a general principle is its presence in most, if not all, national legal systems. General principles are subordinate, however, to both conventional and customary law as sources of international law. *Id.* See also Statute of the International Court of Justice, art. 38, ¶ 3.

Certain general principles are so fundamental as to be essential to the formation of any legal system whether or not they are expressly provided for in its laws. Some of these principles include the right to life, freedom of the person, freedom of thought and religion, and the principle of the rule of law. van Dijk, *supra* note 9, at 1544-45. A second major category comprises principles of national and international law that are applied by analogy to situations in which international law provides no specific rule. *Id.* at 1546. For a discussion of the role of international conventions (especially the International Covenant on Civil and Political Rights, discussed at notes 26-30 and accompanying text *infra*) in codifying certain general principles of the world's legal systems and therefore binding states which have not ratified these instruments, see Havener & Mosher, *General Principles of Law and the U.N. Covenant on Civil and Political Rights*, 27 INT'L & COMP. L.Q. 596 (1978).

U.S.S.R. recognizes only the first two as binding.¹² These sources evidence that the Soviet Union has adopted positive human rights obligations.¹³

12. The Soviet Union does not recognize general principles as a valid source of international law, and, therefore, it is not bound by them. Soviet rejection of general principles simply underscores its resistance to any attempts by other states to intervene in its internal affairs and reflects a highly positivistic approach to international as well as domestic lawmaking. Thus, as a commentator points out, the Soviet Union is unlikely to recognize human rights obligations as binding unless they also are recognized under Soviet law. Uibopuu, *Individuals*, *supra* note 8, at 274.

The Soviet Union relies primarily on article 2(7) of the U.N. Charter, discussed at notes 16-19 and accompanying text *infra*, to argue that other states may not interfere in matters which it deems to be entrusted to its national sovereignty. It finds additional support from the Conference on Security and Cooperation in Europe: Final Act, August 1, 1975, Principle VI, Nonintervention in internal affairs, *reprinted* in 14 INT'L LEG. MATS. 1292, 1294-95 [hereinafter cited as Helsinki Final Act], which provides that participating states refrain from intervention in the domestic affairs of the co-signatories. Additionally, a Soviet commentator has stated that although principles embodied in the world's legal systems may ultimately find expression in international law, national law is not a direct source of international law; it only reflects international rules and principles. Blisshchenko, *International Treaties and Their Application on the Territory of the U.S.S.R.*, 69 AM. J. INT'L L. 819, 825-26 (1975) [hereinafter cited as Blisshchenko]. See Robertson, *The Helsinki Agreement and Human Rights*, 53 NOTRE DAME LAW. 34, 40-41 (1977) [hereinafter cited as Robertson, *Helsinki*].

Recognition of general principles arguably would diminish Soviet sovereignty over its internal affairs, for general principles impose binding obligations regardless of the state's manifestation of assent to a particular rule. See note 11 *supra*. By accepting its obligations to respect human rights under conventional and customary international law and to fulfill these obligations through domestic legislation, however, the Soviet Union has tacitly modified its position on absolute sovereignty to the extent of its commitment to co-signatories to protect human rights within its territory. Further, while Soviet assent initially may have been a precondition to the creation of these obligations, it typically cannot be withdrawn once the instruments have entered into force. See Robertson, *Helsinki*, *supra*, at 42. Compare the Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* December 16, 1966, G.A. Res. 2200 A, 21 U.N. GAOR, Supp (No. 16) 59, U.N. Doc. A/6316 (1966), art. 12, (providing for denunciation by official notification from a state to the Secretary-General of the United Nations) with the U.N. Covenants, notes 26 & 27 *infra* (containing no such provision for denunciation). Moreover, any attempt to denounce the U.N. Covenants is likely to be a nullity because acceptance of them as conventional law has been so extensive that all states are bound regardless of assent. See notes 14 & 18 *infra*. See also Human Rights International Instruments: Signatures, Ratifications, Accessions, etc., ST/HR/4, January 1, 1978 [hereinafter cited as Signatures].

13. Soviet jurists recognize the universally binding force of international law as providing a means to regulate the general nature of international relationships among the states. See CONSTITUTION, *supra* note 2, art. 29. This article states that "[t]he U.S.S.R.'s relations with other states are based on . . . fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from the international treaties signed by the U.S.S.R." *Id.* One of the basic rules of Soviet international law is peaceful coexistence, which is recognized as the best means of promoting world order amid the diversity of national economic and legal systems. Vamvoukos, *Chinese and Soviet Attitudes toward International Law: A Composite Approach*, 5 REV. SOCIALIST L. 131, 136-37 (1979) [hereinafter cited as Vamvoukos]. See CONSTITUTION, *supra* note 2, art. 29. See also Tunkin, *The Contemporary Soviet Theory of International Law*, [1978] 31 CURRENT LEG. PROBS. 177, 185 [hereinafter cited as Tunkin]. The author notes that the Soviets recognize present day international law as "a law of international

Treaties and Conventions

Treaties and conventions¹⁴ are the paramount source of binding international law recognized by the Soviet Union.¹⁵ Preeminent among such documents is the United Nations Charter. Although the Charter neither defines nor catalogues human rights, several provisions impose express obligations on member states.¹⁶ Specifically, articles 1 and 55 require that the states respect human rights, and article 56 declares that article 55 is binding.¹⁷

The Soviet Union, as a signatory to the Charter, is bound to adhere to its principles and norms. This conclusion is consistent with the Soviet view that

cooperation." *Id.* As distinct from its relations with non-socialist states, however, the Soviet Union regards the operation of international law among socialist states as governed by principles of international socialism, which functions independently of the principle of peaceful coexistence. CONSTITUTION, *supra* note 2, art. 30; Vamvoukos, *supra*, at 136-37.

14. Although no fixed meaning can be ascribed to these terms, a treaty suggests a more formal kind of arrangement, while a convention suggests an arrangement that is generally, but not always, less formal or less significant. BRIERLY, *supra* note 11, at 317. A treaty is a means for two or more states to enter into an agreement for a special object, imposing binding obligations only as between the immediate parties. *Id.* at 57. The primary purpose of a treaty quite often is to create an obligation which otherwise would not have existed or to exclude the application of a preexisting rule. *Id.* Treaties are thus a source of international law for the signatories, but ordinarily treaties cannot be regarded as creating new law. *Id.* at 58.

Conventions, by contrast, are a legislative class of treaties; that is, they may be regarded as a source of general law to which a substantial number of states have consented. In consenting, these states seek to declare what they believe the law to be in a certain area, to prescribe general rules for future conduct, or to establish international institutions. *Id.* The nature of conventions as positive law further implies that in particular circumstances they can create obligations binding on all states with or without their assent. *Id.* at 326.

15. Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 CASE W. RES. J. INT'L L. 148, 149 (1975) [hereinafter cited as Erickson]. See also Hazard, *Soviet Tactics in International Lawmaking*, 7 DEN. J. INT'L L. & POL'Y 9, 19 (1977) [hereinafter cited as Hazard, *Tactics*].

16. Humphrey, *supra* note 9, at 35.

17. U.N. Charter art. 1, para. 3 provides in relevant part:

The Purposes of the United Nations are . . .

3. To achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; . . .

U.N. Charter art. 55 provides in relevant part:

With a view of creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

. . . .

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

U.N. Charter art. 56 provides in relevant part:

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

a state party to a convention is bound because that state has explicitly manifested its assent.¹⁸ The Charter lacks sufficient specificity applicable to particular situations, however, and thus it imposes only a general obligation on the Soviet Union.¹⁹ Despite its general language, the U.N. Charter has provided a foundation for the establishment of specific human rights norms in subsequent documents.

The law of internationally protected human rights in time of peace²⁰ began to acquire substance with the Genocide Convention.²¹ That document defines genocide as various acts committed with intent to destroy in whole or in part any national, ethnical, racial or religious group²² and declared such acts to be international crimes.²³ While the Genocide Convention has been ratified by the great majority of states, it has drawn sharp criticism from commentators.²⁴ The instrument protects civilian populations

18. Erickson, *supra* note 15, at 164-65. In addition, Soviet scholars believe that the Charter provisions, taken as a whole, are so basic to interstate relations that the Charter acquires a special status which is binding on non-signatories as a source of customary international law. *Id.* According to these scholars, the principles of the Charter are so firmly fixed in the morality of the world community that no two non-signatory states may agree to the contrary. Hazard, *Tactics*, *supra* note 15, at 23.

19. Although articles 2, 5, 6, and 94 of the Charter provide for various means for the international implementation of obligations, none of these provisions has ever been invoked successfully against the Soviet Union. The United Nations has had recourse, however, to implementation measures in the broader sense of bringing pressure to bear on nations by means of public discussion and by adoption of resolutions, particularly in the General Assembly. While these actions are not legally binding, their effect is felt through influence on public opinion, and they deter conduct as effectively as a legal sanction. Humphrey, *supra* note 9, at 35-36.

20. Human rights are also protected within the context of the humanitarian law of war. The four Geneva Conventions of August 12, 1949 establish the basic foundation for a humanitarian law of armed conflict. 75 U.N.T.S. 31, 85, 135, 287. The aim of these Conventions is to protect noncombatant military personnel and civilians who do not participate in hostilities. van Dijk, *supra* note 9, at 1536-37. Further protection would be provided by the two Protocols additional to the Geneva Conventions of August 12, 1949. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva conventions, *reprinted in* 16 INT'L LEG. MATS. 1391 (1977). Both the Conventions and the Protocols shift legal emphasis from military necessity to humanitarian considerations, and thus the safety and security of the individual are protected in the context of war. See generally J. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975).

21. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter cited as Genocide Convention].

22. *Id.* art. II, at 280.

23. *Id.* art. I.

24. Despite ratification of the Convention by many states, genocide is still committed. Lopez-Rey, *Crime and Human Rights*, 42 FED. PROB. 10, 12 (1978). Perhaps the most serious weakness in the Genocide Convention is its inadequate definition of protected group. Article II applies this term to genocidal acts committed against national, ethnical, racial or religious groups. No protection, however, is offered, to political, social, economic, cultural, or any other human group as such. Moreover, the Convention fails to recognize that genocide primarily is directed against the individual members of specific groups and thus violates individual human rights as well as those of minorities or groups. Consequently, it has been suggested that the definition of genocide be more expansive so as to encompass the deliberate physical destruction

from certain excesses of their own governments in times of war and peace, but because it does not expressly protect individuals against human rights violations; it is too narrow in scope. Thus, the Convention imposes binding obligations on the Soviet Union as a signatory not to commit genocidal acts against protected groups within Soviet territory, but it does not apply to any of the numerous reported cases of government acts committed against individuals.²⁵

Two major United Nations conventions subsequently have begun to fill the void surrounding the need to protect individual human rights. These are the International Covenant on Civil and Political Rights²⁶ and the International Covenant on Economic, Social and Cultural Rights.²⁷ Read together, these conventions define a wide array of human rights norms that heretofore had not risen to the level of conventional law. Some of the major provisions of the Covenant on Civil and Political Rights are as follows:

1. The right of all people to self-determination²⁸ is guaranteed (art. 1).

of any member of a human group by reason of his or her membership in a protected group. 2 P. DROST, *THE CRIME OF STATE: GENOCIDE* 119-36 (1959).

25. One commentator has summarized his criticism of the Genocide Convention by stating that it is "telling evidence of the unwillingness of the members of the United Nations to divest themselves of their monopoly of responsibility for their nationals or more realistically, to become internationally accountable to them." G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 64 (6th ed. 1976) [hereinafter cited as SCHWARZENBERGER].

26. *Adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

27. *Adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966). The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights will hereinafter be referred to together as the U.N. Covenants. The Soviet Union is a signatory to the Covenants. Signatures, *supra* note 12.

28. Broadly defined, self-determination is the direction that a people takes in establishing a system of internal public order, regardless of the form or the internal policies that are pursued. Novogrod, *Civil Strife and Indirect Aggression*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 198, 209 (M. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as Novogrod]. The legal right, as opposed to the political right, to self-determination under international law applies only to a restricted category of cases. The term itself has two distinct meanings. In the first sense, it refers to the sovereign equality among existing states, and in particular to the right of a state to choose freely its own form of government. In the second sense, it refers to the right of a specific territory or "people" to choose its own form of government without intervention by the larger state of which it is a part. Crawford, *The Criteria for Statehood in International Law*, [1976-1977] *BRIT. Y.B. INT'L L.* 93, 152 [hereinafter cited as Crawford]. See U.N. Charter, art. 1, para. 5 and art. 55 (recognizing the right of self-determination in the first sense), and arts. 73(b) and 76(b) (implicitly recognizing it in the second sense). Although self-determination cannot be deemed an operative right on the basis of the Charter, it has nonetheless been given substance by U.N. practice, especially through affirmation in many General Assembly resolutions. Novogrod, *supra*, at 210.

Additionally, under customary international law, there has been sufficient state practice carried out with the belief that such activity is obligatory so as to establish a legal principle of self-determination. Crawford, *supra*, at 157. Among the features of this principle that have evolved as a result of current practice is that the right to self-determination attaches only after the appropriate "unit" of self-determination has been ascertained. One such unit can be charac-

2. Arbitrary deprivation of life is prohibited (art. 6).
3. Torture, cruel, inhuman, or degrading treatment or punishment is absolutely forbidden (art. 7).
4. Slavery and forced labor are likewise forbidden (art. 8).
5. Arbitrary arrest and detention are also prohibited (art. 9).
6. Equal treatment of persons before courts of law is guaranteed (art. 14).
7. Retrospective penal legislation (both as to offenses and punishments) is prohibited (art. 15).
8. Everyone is guaranteed the right to freedom of thought, conscience and religion (art. 18).
9. Freedom of speech is also guaranteed (art. 19(2)).
10. Freedom of assembly and freedom of association are likewise protected (arts. 21 and 22).
11. Racial discrimination is forbidden (art. 4(2)).
12. Everyone is guaranteed the freedom to leave any country, including one's own (art. 12(4)).²⁹
13. The right of all people to the free disposition of their natural wealth and resources is also protected (art. 1(2)).
14. Everyone also has the right to take part in public affairs either directly or through freely chosen representatives (art. 25).
15. Everyone accused of a crime is entitled to protection under certain minimum standards, such as the rights to prepare a defense, to choose counsel and to present witnesses on one's behalf (art. 14(3)).

In addition to these provisions, the Covenant declares that in no case does the existence of a national emergency justify the suspension of the right to life, nor does it permit the use of torture or cruel, inhuman, or degrading treatment or punishment. Moreover, a national emergency is not grounds for illegally declaring someone to be guilty of a criminal offense, nor does it justify suspension of the right to recognition everywhere as an individual before the law.³⁰

terized as a territory forming a distinct political-geographical area whose inhabitants do not participate in the government either of the region or the state of which the territory is part, with the result that this territory is non-self-governing. *Id.* at 160. The recognition of such a unit leads to the conclusion that the right of self-determination should not be so narrowly confined as to include only colonial peoples. It is also at stake in many of the Union Republics of the U.S.S.R. See Novogrod, *supra*, at 210. See also notes 128-32 and accompanying text *infra*.

29. Cf. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as Refugee Convention] (to which the Soviet Union is a signatory). Article 26 obligates each contracting party to accord to refugees lawfully within its territory the right to choose their place of residence and to move freely within that territory, subject to the regulations that the state normally imposes on aliens. For documentation of Soviet ratification of this and other Conventions, see Signatures *supra* note 12.

30. Covenant on Civil and Political Rights, *supra* note 27, art. 4. Derogations allow for the suspension or breach of certain treaty obligations in time of war or public emergency. *Id.* Another related concept is the "clawback" clause which also may be embodied in a treaty. This

The Covenant on Economic, Social and Cultural Rights guarantees first that the principle of self-determination is a legal right and not merely an impolitic and unjustified promise incapable of fulfillment (article 1). Secondly, Group Rights emphasize other principles of self-determination, such as the right of a people to dispose freely of its natural resources and the unlawfulness of depriving a people of its means of subsistence (article 1). The Covenant also contains a nondiscrimination clause and makes specific provision for the equal rights of men and women (article 3). Among the other rights guaranteed are the right to work (article 6), just and favorable working conditions (article 7), protection of family rights (article 10), the right to education (articles 13 and 14), and the right of all people to take part in cultural life (article 15).

The Soviet Union also has ratified the International Convention on the Elimination of All Forms of Racial Discrimination.³¹ From the standpoint of Soviet law, the most significant human rights provision of this Convention is article 5, which forbids discrimination on the basis of race, color, or national or ethnic origin, as to enjoyment of the right to leave any country, including one's own, and to return to one's country.

It is clear that the Soviet Union is committed to a wide range of international obligations in the field of human rights both with respect to individuals and groups. The fact that these obligations are solemn and unambiguous is attested to by the position of the U.S.S.R. concerning the legally binding nature of conventions in international lawmaking. Through its interpretation of conventional law, the Soviet Union recognizes as legally binding only those norms to which it has assented. It thereby asserts that international law promulgated by the West imposes no obligations unless the U.S.S.R. explicitly has agreed to be bound. This approach to international lawmaking also enables the Soviet Union to shape the development of international law and to gain the sustained impetus for new principles it deems essential to its

clause permits the breach of an obligation in normal circumstances for specific reasons such as the preservation of national security, or the demands of democracy or public order. Higgins, *Conceptual*, *supra* note 9, at 28. Derogation, by contrast, is permitted in conditions of national emergency of such magnitude as to threaten the survival of the nation. While such a provision may be necessary to accommodate the needs of a state in performing its public duties for the common good, it is undesirable for a state to exercise this right where no reasonable need of the state could be served by suspension of basic human rights. See Higgins, *Derogations Under Human Rights Treaties*, [1976-1977] BRIT. Y.B. INT'L L. 281, 282, 289 (1978) [hereinafter cited as Higgins, *Derogations*]. Although it is doubtful in such cases whether the common good would be served, derogation and clawback clauses, as well as the issues of individual right of petition and the jurisdiction of the court, pose serious obstacles to persons seeking to assert human rights claims. Higgins, *Conceptual*, *supra* note 9, at 28-29. See note 33 and accompanying text *infra*. Cf. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, [1950] Europ. T.S. No. 5, 213 U.N.T.S. 221, art. 15 [hereinafter cited as European Convention] (providing that in time of public emergency, suspension of certain formalities may be justified, but the abolition, even temporarily, of human rights is forbidden).

31. March 7, 1966, 660 U.N.T.S. 195 [hereinafter cited as Racism Convention]. See Signatures, *supra* note 12.

policies and ideology.³² Although the Soviet Union is unwilling to accept the current trends in human rights law promoted by Western nations (particularly the right of individual petition before an internationally constituted judicial body),³³ it presses for adoption of human rights where support

32. Thus, Soviet conventional law both reflects and is an intrinsic component of Soviet foreign policy. J. TRISKA & R. SLUSSER, *THEORY, LAW, AND POLICY OF SOVIET TREATIES* 175-79 (1962) [hereinafter cited as TRISKA]. Recognition of conventional law as the primary source and prima facie basis for international relations has gradually gained acceptance outside the Soviet bloc. The U.S.S.R. is now in a position to advance its own principles of conventional law and thereby to shape its content. *Id.* at 25-26. Moreover, in the event of a conflict between an international treaty and Soviet federal legislation, with the exception of the Constitutions of the Union and Union Republics, the rule of the treaty assumes priority. This doctrine of treaty preeminence is further evidence of the importance of treaties and conventions to the Soviet Union. K. GRZBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW* 30-31 (1970) [hereinafter cited as GRZBOWSKI, *SOVIET*].

33. Uibopuu, *Individuals*, *supra* note 8, at 268. Its justification for this practice is that protection of human rights is exclusively within the domestic jurisdiction of the states. *Id.* Codification of the law of human rights has produced diverse mechanisms for implementation, yet enforcement of human rights has been largely unfulfilled. One such mechanism, the European Convention, *supra* note 30, is regarded by some commentators as the most effective system yet created for the protection of human rights. Its great merit is that the individual is granted access to an international organ which can investigate the complaint, provided that the state concerned has subscribed to the "right of individual petition" and the individual has exhausted local remedies. *Id.* arts. 19, 25. See Humphrey, *supra* note 9, at 48-49; Robertson, *Global*, *supra* note 9, at 23-24. See generally A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1977). At the international level, implementation is achieved primarily by two organs: the European Commission of Human Rights, and a European Court of Human Rights. The Commission is essentially a conciliatory body, but it also may state its opinion that disclosed facts reveal a violation of human rights by a state party. Moreover, mere ratification of this Convention exposes a signatory to the possibility that another state party will accuse it of a breach before the Commission. European Convention, *supra* note 30, art. 24. See Humphrey, *supra* note 9, at 49.

In the western hemisphere, the leading human rights document is the American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records, OEA/Ser. K/XVI/1.1 Doc., 65, Rev. 1, Corr. 2 of Jan. 7, 1970. This Convention grants persons, groups, and non-governmental organizations the right to lodge petitions with the Inter-American Commission on Human Rights on behalf of others whose rights allegedly have been violated. *Id.* arts. 44, 45. States which ratify the Convention are subject to disputes with other states only if they expressly recognize the competence of the Commission to hear state applications. Humphrey, *supra* note 9, at 51-52.

Another mechanism is found in the Covenant on Civil and Political Rights, *supra* note 26, arts. 28-45, which provides for international implementation through creation of a Human Rights Committee. The Committee's functions are to deal with reports from states-parties and to consider complaints by one state that another has not fulfilled its obligations. This procedure has been criticized as highly complicated and subject to long delays. In addition, neither the Human Rights Committee nor a Conciliation Committee (created under art. 42), is empowered to make judicial determinations. *Id.* See Humphrey, *supra* note 9, at 47.

Implementation of human rights also could be sought through the Optional Protocol to the Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966), arts. 1, 2. A state-party to the Covenant that is also a party to the Protocol recognizes the competence of the Human Rights Committee to receive and consider complaints from individuals who claim to be victims of violations by that

among Soviet-led and developing countries is forthcoming. Thus, the Soviet Union is disinclined to receive conventional law formulated and adopted by capitalist countries, but it is prepared to join with the new majority to form a coalition now capable of making international law.³⁴

Finally, consideration must be given to the Helsinki Final Act of August 1, 1975.³⁵ That document, neither a treaty nor a convention, is a declaration of intentions, and as such it does not require ratification by a legislative body, and non-observance of its provisions does not constitute a breach of any obligation recognized under international law. The Helsinki Final Act imposes moral obligations on participating states to respect human rights, and it directly involves them as a proper subject of international undertaking.³⁶ The focus of the Act is upon greater international security and closer relations between states with special recognition of the inviolability of participants' frontiers as they existed at the end of World War II.³⁷ Thus, the Helsinki Final Act emphasizes the actions of states toward one another rather than the circumstances or behavior of individuals. Human rights principles are discussed, however, in Basket VII of the "Declaration of Principles guiding Relations between Participating States." These principles in-

state. The Committee is permitted to forward its recommendations, however, only to the state and the individual. *Id.* arts. 1-5. The Optional Protocol has been attacked as providing only a feeble enforcement mechanism and for failing to provide means whereby third parties may bring complaints on behalf of individuals unable to petition on their own behalf. Humphrey, *supra* note 9, at 45.

34. Hazard, *Tactics*, *supra* note 15, at 11, 27-28. Soviet policy in international law favors the struggle against broad violation of human rights by states. Thus, the U.S.S.R. has singled out practices such as aggression, fascism, colonialism, genocide, apartheid, racism, and slavery. It has ratified a number of conventions which declare such practices to be international crimes. *E.g.*, Genocide Convention, *supra* note 21; Racism Convention, *supra* note 31; Refugee Convention, *supra* note 29; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, July 18, 1976, G.A. Res. 3068, 28 GAOR (No. 50), U.N. Doc. A/9233/Add. 1 (1973); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, September 7, 1956, 266 U.N.T.S. 3. *See* Signatures, *supra* note 12. *See also* Tunkin, *supra* note 13, at 185-86. The Soviet Union's condemnation of fascism is evidenced also by its signing of the Moscow Declaration of October 30, 1943, followed by the London Declaration of August 8, 1945, which established the International Military Tribunals at Nuremberg and Tokyo. The U.S.S.R. also adopted Control Council Ordinance No. 10, December 20, 1945, which conferred jurisdiction upon the Allies to try lower level war criminals within the Allies' post World War II zones of occupation. Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 *REVUE INTERNATIONALE DE DROIT PÉNAL* 405, 415-16 (1975).

35. *See* note 12 *supra*.

36. Robertson, *Helsinki*, *supra* note 12, at 34-35; Goldberg, *Human Rights and the Belgrade Meeting*, 30 *HASTINGS L.J.* 249, 250 (1978). By contrast, a fundamental principle of Soviet international law is that treaty obligations must be strictly and unequivocally observed. TRISKA, *supra* note 32, at 97-100. *See generally* BRIERLY, *supra* note 11, at 57-58, 325-26; Robertson, *Helsinki*, *supra* note 12, at 35-36. Another commentator states that Soviet scholars usually classify individual human rights as socio-economic rights. Uibopuu, *Individuals*, *supra* note 8, at 274.

37. Helsinki Final Act, Principle IV, Territorial Integrity of States, *supra* note 12, at 1295.

clude an agreement among the states to "respect" freedom of thought, conscience and religion or belief, and to "promote and encourage" the exercise of civil, political, economic, social, and cultural rights and freedoms.³⁸ In addition, the principles concerning Cooperation in Humanitarian and Other Fields are designed to promote freer movement of individuals by obliging the signatories to expedite travel on the basis of family ties, reunification, proposed marriages, and travel for personal and professional reasons.³⁹

The Helsinki Final Act is important despite its lack of treaty status because it can be effective in ensuring greater regard for human rights by means of its dissemination in the U.S.S.R. Such publicity in turn would encourage dissidents and public officials to resist abuses of human rights.⁴⁰ Helsinki also is important because it is a step toward formal recognition of additional human rights obligations through treaty action. Western jurists, arguing that human rights have taken treaty form, are demanding recognition of individual complaints under Helsinki.⁴¹ Thus, while the Soviet argument that the human rights provisions of Helsinki do not rise to the level of a treaty cannot be dismissed summarily, there is cause for optimism that what began as a declaration of intentions may ultimately ripen into a formal obligation. Despite its non-treaty status, the Helsinki Final Act strengthens the mechanisms for protection of human rights.

Customary International Law

The secondary source of international law that the Soviet Union recognizes as binding is customary international law.⁴² This source is viewed as subordinate to conventional law and is relied upon primarily to fill gaps in treaties.⁴³ Although Soviet jurists are reluctant to receive customary law from Western countries, as they had no share in its development, some Soviet scholars have argued that new and advanced international norms have emerged, particularly the right of national self-determination, peaceful

38. *Id.* at 1295.

39. *Id.* at 1313-14. See Turack, *Freedom of Transitional Movement: The Helsinki Accord and Beyond*, 11 VAND. J. TRANSNATIONAL L. 585, 586 (1978) [hereinafter cited as Turack].

40. Hazard, *Tactics*, *supra* note 15, at 40.

41. See Robertson, *Helsinki*, *supra* note 12, at 47.

42. Customary international law, as formulated by Western jurists, derives from a usage or practice by the states which becomes accepted as obligatory. Thus, if a customary practice is violated, it is believed that some sanction should be presented for the transgressor. BRIERLY, *supra* note 11, at 59. Article 38(1) of the Statute of the International Court of Justice provides that custom is "evidence that a general practice is accepted as law." Two requirements normally must be met in order to determine that a given custom is legally binding. First, there is the concrete requirement of repetitive action, sometimes called "usus." Second, there is a psychological element whereby the action is repeated with the conviction that such conduct fulfills a legal obligation or exercises a legal right. van Dijk, *supra* note 9, at 1541-43.

43. Erickson, *supra* note 15, at 150-51. See also Uibopuu, *Individuals*, *supra* note 8, at 285-87.

coexistence, and disfavor of unequal treaties.⁴⁴ It has been argued further that increased Soviet influence in international lawmaking will weaken the "bourgeoise" character of customary law.⁴⁵ Consequently, Soviet jurists have expressed interest in recognizing customary law that bears the imprint of Soviet ideology. Prior to adopting a customary norm, however, these jurists will determine whether requirements of time, repetition and continuity have been met, as well as the indispensable requirement of agreement among the states.⁴⁶

The effect of the Soviet theory becomes apparent when these four criteria are applied to international human rights instruments such as the United Nations Charter and the Universal Declaration of Human Rights of 1948.⁴⁷ According to the Soviet view, the Charter is binding on signatory and non-signatory alike because of widespread ratification by the states.⁴⁸ The Char-

44. Erickson, *supra* note 15, at 151. *But see* Uibopuu, *The International Legal Status of Soviet Minorities Today*, 2 REV. SOCIALIST L. 217, 218 (1977) [hereinafter cited as Uibopuu, *Minorities*] (arguing that there has been scant development of customary law for the protection of the human rights of Soviet minorities).

45. Erickson, *supra* note 15, at 151. At the inception of the Soviet State in 1917, the officially stated government policy was to rely solely on treaties as the source of its international rights and duties; however, elements of customary law were implicit in the actions of the U.S.S.R. from the beginning. As the government's position evolved, custom acquired greater significance and is today second only to treaties as the primary source of Soviet international law. *Id.* at 148-49. *See generally* TRISKA, *supra* note 32, at 10-23.

46. Erickson, *supra* note 15, at 151, 154-57. According to Soviet scholars, time refers to duration of a practice. Repetition requires that the actions be reiterated through time, and continuity means that the practice must not be interrupted. *Id.* at 154-56. Agreement among the states first requires coordinated wills. In essence, this refers to a reciprocal recognition by the states that a particular rule constitutes a norm of international law. Secondly, the states must agree on the substantive content of the rule. These norms acquire the force of law when the states manifest their intention to be bound. *Id.* at 158-59. *See also* Hazard, *Tactics*, *supra* note 15, at 19-20; GRYZBOWSKI, SOVIET, *supra* note 32, at 409-11.

47. International Bill of Human Rights, Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration of Human Rights]. The Soviet Union has, however abstained from voting in favor of the resolution, but this fact is not mentioned by most Soviet authors. Uibopuu, *Individuals*, *supra* note 8, at 286.

48. *Cf.* The International Court of Justice in the Advisory Opinion on The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, which concluded unequivocally that the Charter imposes human rights obligations on member states and that these are self-executing obligations which gain specific content from the Charter and other human rights instruments. *Id.* at 57. For a comprehensive survey of the arguments that the U.N. Charter and the Universal Declaration of Human Rights impose obligations on all states to protect human rights regardless of assent, see Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972). Historically, however, Soviet scholars viewed customary norms as binding only if a state had explicitly assented to be bound. Accordingly, the U.S.S.R. was not bound by any customary law to which it had not given prior agreement. *See* TRISKA, *supra* note 32, at 21. This approach was more expedient at a time when the Soviet Union lacked the military and political power that it possesses today. By contrast, one Western commentator adopts the view that only those states which have explicitly rejected the content of a customary norm cannot be regarded as bound by it. van Dijk, *supra* note 9, at 1543.

ter thus becomes declaratory of customary international law on the subject of human rights and imposes binding obligations on all nations.

Similarly, the Universal Declaration of Human Rights, though not a treaty, embodies human rights principles so widely accepted as to be declaratory of customary law and to provide a source for subsequent interpretation of the human rights provisions of the U.N. Charter.⁴⁹ By applying the standards of Soviet scholars for acceptability of a customary practice, it is clear that the Universal Declaration qualifies as customary law. It not only has endured as a valid instrument for over three decades, but it also has engendered other documents, such as the U.N. Covenants, which specify substantially the same rights as the Declaration.⁵⁰ Further, the Declaration has served as the basis for reiterated behavior among states, and there has been no retreat from or other interruption of the practices that it espouses. Most importantly, in formulating the Declaration, the world community acted collectively within the framework of the United Nations General Assembly to express its opinion concerning international recognition of human rights. This action is significant as reflecting the consensus position of the states.⁵¹ Consequently, many clauses of the Declaration (and arguably the entire document) have come to be recognized as binding customary law through both the general support received at the time of adoption and subsequent United Nations practice.⁵² In this manner, the Universal Declaration conforms to the Soviet Union's rationale governing customary law and should be regarded as binding.

49. See Vienna Convention on the Law of Treaties of 1969, U.N. Conference on the Law of Treaties, Doc. A/Conf. 39/27, May 23, 1969, art. 31. This document provides that the conduct of the parties subsequent to the conclusion of a treaty may be relied upon for interpretation of present obligations. Thus, subsequent agreements and customary practices become sources of interpretation of prior treaty provisions. Accordingly, the Universal Declaration should be regarded as a subsequent agreement which interprets article 55 of the Charter, as evidenced by the preamble to the Declaration:

Whereas, the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Universal Declaration of Human Rights, *supra* note 47. Article 31 of the Vienna Convention thus permits subsequent interpretation of article 55 of the U.N. Charter by means of the Universal Declaration. As a result, specific guarantees of the Declaration are incorporated into the general human rights provisions of the Charter, and violation of these obligations constitutes a breach of international law. See also *Britain v. Albania* (Corfu Channel Case), [1949] I.C.J. 25; *Anglo-Iranian Oil Co.'s case*, [1952] I.C.J. 93; *Southwest Africa cases*, [1966] I.C.J. 4. See generally A. McNAIR, *LAW OF TREATIES* 424-27 (1969); SCHWARZENBERGER, *supra* note 24, at 136-37; Harvard Research in International Law, Draft Convention on the Law of Treaties, 29 AM. J. INT'L L. SUPP. 657-71 (1953).

50. See notes 26-30 and accompanying text *supra*.

51. The Universal Declaration also is generally regarded as the authentic interpretation of the human rights provisions of the U.N. Charter. Humphrey, *supra* note 9, at 33.

52. Higgins, *Conceptual*, *supra* note 9, at 22; van Dijk, *supra* note 9, at 1543.

It is reasonable to conclude that customary international law may impose additional human rights obligations on the Soviet Union by filling gaps in present treaties and by providing the doctrinal basis for future obligations. Therefore, customary law, as a source of human rights principles, should be relied upon to supplement and amplify conventional law, especially when the binding nature of the duties imposed finds support within the Soviet framework.

HUMAN RIGHTS VIOLATIONS UNDER SOVIET DOMESTIC LAW

Despite the Soviet Union's recognition of a wide range of human rights, the implementation and enforcement of these rights is subject to a degree of conflict with Party-influenced government policy. Consequently, certain types of individuals and groups are denied protections when their interests are regarded as incompatible with the policies and objectives of the CPSU, at least to the extent that these policies are interpreted by administrative and judicial functionaries. The actual risk posed by the individual or group may, in reality, be relatively minor compared to the immensity of the State's power to carry out its policies. The willingness and ability of the government to crush what it regards as opposition not only reflects the pervasiveness of its control, but also its belief that in order to maintain power it cannot permit dissident or counterrevolutionary elements to create discord or to hinder the State on the course that the Party, with its professed superior understanding, has charted.

Traditionally, Jews, certain ethnic, religious and linguistic minorities, aliens, and political dissidents have experienced the harshest treatment due to the discerned threat that their behavior poses to state security. The Soviet government asserts that it has acquired a special interest in the resolution of these cases. Prosecution of offenses often would not be initiated at all if "ordinary" persons were involved, nor would the punishments imposed be as harsh.⁵³ Moreover, in many cases criminal charges against these individuals are explained in terms of the "degree of risk" presented to the State and thus fail to conform to any definite legal criteria. In many other cases the criminal charges are simply the result of official prejudice. Further, political ideology or personal motivation are not necessarily germane to the treatment of these victims.⁵⁴

53. See Dershowitz, *Due Process of Law in the Trial of Soviet Jews*, 4 ISRAEL Y.B. HUMAN RIGHTS 253, 255 (1974) [hereinafter cited as Dershowitz]. See also Shtromas, *Crime, Law and Penal Practice in the USSR*, 3 REV. SOCIALIST L. 297, 300 (1977) [hereinafter cited as Shtromas] (arguing that although political and economic crimes are viewed as direct threats to the survival of the Soviet system, general delinquency crimes represent no such threat and should be regarded as normal social deviance).

54. See Forsythe, *Political Prisoners: The Law and Politics of Protection*, 9 VAND. J. TRANSNATIONAL at 298-99 (1974). The author discusses the general phenomenon of political

Soviet Jews

In many respects the Soviet legal system has undergone significant changes since 1958. Substantive offenses are now defined with greater specificity, and procedural safeguards exist at all stages in the criminal process.⁵⁵ The Soviet system has retained, however, a variety of institutionalized practices which violate the human rights of Soviet Jews, particularly in the areas of emigration, the internal passport system, and criminal due process rights. Further, fundamentals of justice and fairness are often disregarded in the areas of family law and labor law as the result of emigration requests by Jews.

a. Emigration

One of the most widely reported abusive practices concerns the measures devised by government officials to create nearly insurmountable obstacles for Jews who apply for exit visas. Although a request to leave is not in theory a violation of Soviet law,⁵⁶ Jews are harassed by administrative officials, policemen, and private citizens motivated either by anti-Semitism, or by a misguided spirit of Communism.⁵⁷

The lack of a code of administrative procedure and the fact that certain types of normative acts are unpublished, except for use by relevant authorities,⁵⁸ have led to decisions not grounded in legality and even to arbitrary denials of permission to Jews to exit. Abuse of administrative discretion also may result in retaliation affecting the applicant's family and employ-

prisoners and notes that many are detained under "non-security laws" or "quasi-security charges" which relate logically to the notion of security, rather than to the actual wording of any law. Thus, the ideology or motivation of the individual might be disregarded by a government. Beyond this, the concept of security risk is subject to excessive government manipulation, but, by contrast, any violation of law may threaten government security if it is sufficiently widespread. *Id.* Despite the imprecision of the term "political prisoner" and the broad categories of individuals to whom it is applicable, the importance of balancing the Soviet Union's policies with respect to these individuals against its human rights obligations is neither diminished nor invalidated. The content of human rights norms remains specific and ascertainable even if the subjects of these protections can only be loosely defined.

55. For works which analyze contemporary Soviet criminal law, see BASSIOUNI & SAVITSKI, *supra* note 7; Osakwe, *Due Process*, *supra* note 1; Osakwe, *Contemporary Soviet Criminal Law: An Analysis of the General Principles and Major Institutions of Post-1958 Soviet Criminal Law*, 6 GA. J. INT'L & COMP. L. 437 (1976) [hereinafter cited as Osakwe, *Analysis*].

56. Pettiti, *The Administrative Practice, the Measures Taken and the Harassments Applied Following the Requests for a Visa*, 4 ISRAEL Y.B. HUMAN RIGHTS 288, 291 (1974) [hereinafter cited as Pettiti].

57. One author reports cases of Jews who were attacked by anti-Semitic hooligans and, in some cases, assaulted at police stations after they requested permission to leave. *Id.*

58. Lapenna, *The Contemporary Crisis of Legality in the Soviet Union Substantive Criminal Law*, 1 REV. SOCIALIST L. 73, 86 (1975) [hereinafter cited as Lapenna]; Loeber, *Legal Rules for "Internal Use Only,"* 19 INT'L & COMP. L.Q. 70, 73, 79-80 (1970) [hereinafter cited as Loeber]. See also Vanneman, *supra* note 6, at 301.

ment.⁵⁹ Penal law also may be invoked as a repressive measure, whereby applicants may be prosecuted for the major offense of antipatriotic behavior detrimental to the State.⁶⁰ Another tactic is to call up an applicant or his son for military service. This device both serves as a deterrent to requests and as a punitive action following refusal.⁶¹ In addition to these barriers, the government demands family concurrence in decisions to emigrate. This concurrence will be difficult to obtain if one spouse is unwilling to leave, if there has been a divorce, or if the applicant's parents are unwilling to leave.⁶² Finally, while the cost to an applicant to file for an exit visa is only 40 rubles, another 860 rubles is payable before departure, thus imposing a financial burden equivalent to \$1200.⁶³

It is difficult to comprehend how these harsh and arbitrary measures preserve state security. Indeed, quite often the wide range of discretion may lead to administrative confusion, so that while officials distract themselves with the innocent, the genuine security risk may escape. If it is necessary to screen Jewish emigration applicants to ensure that state secrets do not exit with them, an approach with clearly defined standards and procedures would be more efficient. Leaving emigration decisions to the discretion of officials is therefore counterproductive to the State's interests and loses sight of the Marxist-Leninist principle that law is to be invoked in the service of the State.⁶⁴

59. One such case is that of Aranovich, who applied for permission in 1972 to leave the U.S.S.R. for the United States. Permission was granted to two members of his family but denied to Aranovich himself on the grounds that he worked for a classified project. The applicant claimed that he had not worked on any such project for a long period of time and that the questions he had dealt with were discussed in public literature. The authorities responded by insuring that Aranovich lost his job, disconnecting his telephone, and evicting him from his apartment. Permission was refused again in 1975 and 1976, both times without any reasons given. Liacouras, *The Case of Felix Aranovich*, 6 HUMAN RIGHTS 295 (1977).

60. Pettiti, *supra* note 56, at 292-93. Charges also are brought for minor offenses such as violence, larceny or hooliganism. Both the serious and the minor charges have the effect of discrediting the applicant and of deterring others from applying. *Id.*

61. *Id.* at 297.

62. *Id.* at 300.

63. Mehl & Rapoport, *Soviet Policy of Separating Families and the Right to Emigrate*, 27 INT'L & COMP. L.Q. 876, 879-80 (1978) [hereinafter cited as Mehl]. Subsequent to the Helsinki Final Act, statutory provisions governing exit from the Soviet Union have singled out a separate category of stateless persons, which includes Jews wishing to leave the U.S.S.R. This change in status is achieved by requiring applicants to surrender their Soviet citizenship and thus exit as stateless persons. Accordingly, applicants must have substitute travel documents bearing a valid exit visa and must pay another 500 rubles to renounce their citizenship and emigrate to a capitalist country or Israel. *Id.* Since signing the Helsinki Final Act, the U.S.S.R. has simplified its complex emigration procedures, but Jews seeking exit visas to Israel still face serious difficulties. Turack, *supra* note 38, at 599-600. Moreover, the number of exit visas granted increased at a constant rate both before and during the five month Belgrade Conference of October 4, 1977, during which the implementation of the Helsinki Final Act was formally evaluated. *Id.* at 585-86, 606-07.

64. See note 5 *supra*.

The Soviet Union is obligated under international law to respect the right of individuals to emigrate.⁶⁵ As a general rule, recognized rights may be suspended by a state only in time of war or extreme emergency threatening the survival of the nation.⁶⁶ Freedom of emigration can fall within this exception because in such circumstances a nation in need of all available manpower may not be able to dispense with those who wish to emigrate. No crisis threatens the Soviet Union today, however, that would justify this treatment of prospective Jewish emigrants.⁶⁷

Several restrictions on the right to emigrate in nonemergency situations are permitted under the international agreements that the Soviet Union has ratified. For example, article 12 of the Covenant on Civil and Political Rights prohibits restrictions on the freedom of emigration except as provided by law and as necessary to protect national security, public order, health or morals, or the rights and freedoms of others.⁶⁸ There are reports, however, of many cases in which Jews have been refused permission to emigrate, although none of these criteria were met.⁶⁹ Soviet rejection of those emigration requests constitutes a systematic violation under international law of the collective right of Jews to preservation of their group identity.⁷⁰ Moreover, to entrust emigration decisions to administrative officials unfettered by standards or guidelines runs afoul of the Soviet Constitution, in particular article 34, which grants equal rights to citizens of the U.S.S.R. irrespective of race or nationality.

Emigration requests by Soviet Jews have in other cases led officials to misapply substantive law in the area of domestic relations, affecting both parental custody of children and religious and educational freedom. For example, the State may find that parents who apply for exit visas have failed to rear their children in accordance with the precepts of Communism and

65. See, e.g., International Covenant on Civil and Political Rights, *supra* note 26, art. 12; Racism Convention, *supra* note 31, art. 5(d); Universal Declaration of Human Rights, *supra* note 47, art. 13. Cf. Refugee Convention, *supra* note 29, art. 34 (providing that the contracting states, as far as possible, agree to assimilate and naturalize refugees as defined in art. 1). See also Chalidze, *The Expulsion and Expatriation in International Law: The Right to Leave, to Stay and to Return*, PROC. AM. SOC'Y INT'L L. 122, 132 (1973).

66. International Covenant on Civil and Political Rights, *supra* note 26, art. 4. Cf. European Convention, *supra* note 30, art. 15. See Higgins, *Derogations*, *supra* note 30, at 281, 286-88.

67. Dinstein, *Freedom of Emigration and Soviet Jewry*, 4 ISRAEL Y.B. HUMAN RIGHTS 266, 268 (1974) [hereinafter cited as Dinstein, *Emigration*].

68. These restrictions must be consistent with other rights provided in the Covenant.

69. Dinstein, *Emigration*, *supra* note 67, at 268-73.

70. Dinstein, *Emigration*, *supra* note 67, at 273. See also Mehl, *supra* note 63, at 879-82 (arguing that the conditions on the right to emigrate which the U.S.S.R. has imposed do not find support in any of the major international human rights instruments). Professor Dinstein argues further that a state unable or unwilling to protect the identity of a human group must at least allow individual members the chance to preserve their future elsewhere. The greater the oppression and discrimination against a group, the more compelling is the need to allow emigration. Therefore, fewer, rather than more, restrictions should be placed on the right of Soviet Jews to leave the U.S.S.R. Dinstein, *Emigration*, *supra* note 67, at 273.

thereby deprive them of parental rights. The grounds for making this determination need not follow positive law. Instead, the visa application can be equated with the parents' failure to instill Communist ideals in the child.⁷¹ Thus, the abstractions of political ideology embodied in the Soviet Constitution⁷² can render unlawful an emigration request that is found to be in con-

71. One case is that of Temkin, a Jewish father who was denied custody of his daughter based on testimony that he had turned her against the Soviet way of life by encouraging her to learn about and participate in Jewish cultural activities. Temkin had sought to emigrate to Israel with his daughter and her mother, from whom he had obtained a divorce. A court granted the mother custody of the child, but Temkin took the girl from her mother's home. The mother then brought proceedings in the Moscow local people's court to regain custody. The court deprived Temkin of parental rights after hearing testimony that he had encouraged his daughter to participate in Jewish cultural activities such as learning Hebrew, going to synagogue, and wearing a Star of David, and had thereby turned her against the Soviet way of life. Also, because the child missed a number of school classes, Temkin was charged with failure to educate her. Kiralfy, *A Postscript on Consequential Breaches of Legality in Civil Proceedings*, 1 REV. SOCIALIST L. 113, 114-115 (1975) [hereinafter cited as Kiralfy]. See *Fundamentals of Legislation of the USSR and the Union Republics on Marriage and the Family*, art. 18 in FUNDAMENTALS OF LEGISLATION OF THE USSR AND THE UNION REPUBLICS 345 (M. Saifulin & Y. Sdobnikov trans. 1974) [hereinafter cited as USSR Family Law Legislation]. Temkin was deprived of parental rights on the basis of the anti-social influence he had on his daughter, but this finding was supported mainly by the fact that he allowed her to take part in Jewish cultural activities. Kiralfy, *supra*, at 117.

Arguably, the court's decision was consistent with the Constitution in finding that Temkin failed to rear his child to be a worthy member of Communist society. See CONSTITUTION, *supra* note 2, art. 66. The court ignored, however, certain of Temkin's constitutional rights. By denying him parental rights on the grounds of his involvement in Jewish culture, the court violated his right to freedom of assembly. See *id.*, art. 50. It also failed to consider his right to freedom of religion. *Id.* art. 52. Even if Temkin's *advokat* did not raise these issues, they were presumptively within the scope of the court's inquiry as one of the duties of judges, prosecution and defense to search objectively for the truth. See Osakwe, *Due Process*, *supra* note 1, at 281; note 92 *infra*.

Moreover, depriving Temkin of parental rights because he exposed his daughter to Jewish culture is inconsistent with the obligation of the Soviet government under the International Covenant on Economic, Social and Cultural Rights, *supra* note 27, art. 15(1), that citizens be allowed to take part in cultural life. The court's actions also denied Temkin his rights under the International Covenant on Civil and Political Rights, *supra* note 26, to freedom of religion (art. 18) and the right to peaceful assembly (art. 21). Finally, under the Convention against Discrimination in Education, adopted December 14, 1960, 361 U.N.T.S. 94, art. 5, which the U.S.S.R. ratified in 1962, parents have the right to ensure that their children receive religious and moral education in conformity with their own convictions. Boim, *Review Article: Human Rights in the USSR*, 2 REV. SOCIALIST L. 173, 175 (1976) [hereinafter cited as Boim, *Human Rights*]. This provision appears to conflict with the U.S.S.R. Family Law Legislation, *supra*, art. 18, which requires parents to rear their children "in the spirit of the moral code of the builder of Communism." Despite the guarantee of the Convention, should a Soviet court decide that children are being reared contrary to this moral code, parents may be deprived of their parental rights under U.S.S.R. Family Law Legislation, *supra*, art. 19. Such action has been taken not only against Jews, but also against Baptists. Boim, *Human Rights*, *supra*, at 175.

72. See CONSTITUTION, *supra* note 2, art. 66 (providing that Soviet citizens have a duty to show concern that their children are brought up to be "worthy members of socialist society"). See also Feldbrugge, *Study*, *supra* note 5, at 212 (arguing that the new Soviet Constitution is an elaborate reaffirmation of ideological and political doctrines). The preamble and first five chap-

flict. The ordinary guarantees of domestic law simply do not afford adequate protection to applicants in such circumstances.

The government frequently responds to Jewish visa applicants by wrongfully dismissing them from employment. This action may be followed by making it impossible for them to obtain new employment in their specialized trade or profession⁷³ or by finding them to be unqualified for their position.⁷⁴ The latter determination could be made on the basis of the employee's nationality, his or her Party affiliation, or the extent to which he or she participates in social life.⁷⁵ Alleged possession of employment-related state secrets is another response to visa requests and is used as grounds to deny permission to emigrate, despite the employee's showing to the contrary.⁷⁶

These discriminatory employment practices conflict with article 34 of the Soviet Constitution, which establishes the equality of all citizens in economic endeavors. Individuals who find it impossible to acquire fresh employment also are denied the right to work as provided in article 40 of the Constitution. Furthermore, these practices are inconsistent with rights guaranteed under international law that prohibit discrimination in employment due to membership in a national, religious, or linguistic group.⁷⁷ Similarly, the Covenant on Economic, Social and Cultural Rights prohibits discrimination in employment based on race, language, religion, or national origin by guaranteeing all individuals the right to work and the right to freely choose one's occupation.⁷⁸

b. Internal Passport System

A more subtle example of Soviet governmental control of its Jewish minority is the internal passport system. Regulations recently enacted to implement this system require each individual traveling within Soviet territory to carry on his or her person a prescribed document identifying the holder and,

ters largely contain declarations "which are almost devoid of legal significance" and which are almost verbatim statements of the Program of CPSU. *Id.*

73. This claim was made in the Temkin case, note 71 *supra*. See Kiralfy, *supra* note 71, at 118-19.

74. See Fundamentals of Labour Legislation of the USSR and the Union Republics, art. 17 (2) in FUNDAMENTALS OF LEGISLATION OF THE U.S.S.R. AND THE UNION REPUBLICS 98 (M. Saifulin & Y. Sdobnikov trans. 1974) [hereinafter cited as Saifulin], which permits the dismissal of an employee on the grounds that he is unqualified for his position.

75. Kiralfy, *supra* note 71, at 119.

76. This was also a problem in the Aranovich case. See note 59 *supra*.

77. International Labour Organization Convention (No. 111) concerning discrimination in employment and occupation, June 25, 1958, 362 U.N.T.S. 32, art. 1. The Soviet Union ratified this Convention on January 31, 1961. See Uibopuu, *Minorities*, *supra* note 44, at 218 & 229, n.12.

78. Article 2 of the Covenant, *supra* note 27, prohibits discrimination in the enjoyment of the rights guaranteed under the Covenant on the basis of, *inter alia*, race, language, religion, or national origin. Article 6 guarantees the right to work and the right to freely choose one's occupation. Therefore, these articles together prohibit employment discrimination on such grounds.

inter alia, stating his or her nationality.⁷⁹ Although the new passport system is viewed as a liberalization of restrictions on movement within the Soviet Union, in reality the record of nationality enhances the possibility of nationality-based discrimination in education, employment, and social accommodation,⁸⁰ all of which are impermissible under the Constitution. In particular, denial of the equality of all Soviet citizens before the law in pursuit of economic and social endeavors (article 34) and of the equal rights of Soviet citizens of different races and nationalities (article 36) is forbidden.

If the internal passport system were used to discriminate against Jews, this practice would constitute a denial of protections guaranteed to Soviet citizens under article 12 of the Covenant on Civil and Political Rights, which provides that every person lawfully within the territory of a state has the right to freedom of movement and to choice of residence. Such discrimination also would evidence a failure to comply with the Racism Convention.⁸¹ Article 1 defines racial discrimination as, *inter alia*, any exclusion or restriction based on national or ethnic origin for the purpose of denying equality in the enjoyment of human rights in political, economic, social, and cultural endeavors. Article 4 requires signatory states to forbid their government officials from promoting racial discrimination, and article 5 guarantees that everyone has the right to freedom of movement and residence within a state's borders. If the Soviet government uses the internal passport system for purposes of racial discrimination that result in denials of educational, employment, and social opportunities for Soviet Jews as well as restrictions on their freedom of movement and residence, then it clearly fails to fulfill specific international obligations.

c. Criminal Procedure and Imprisonment

Perhaps the most widespread human rights violations against Soviet Jews have occurred in the context of guaranteed due process of law in criminal procedure. Abuses exist within the procedural stage of investigation and indictment as well as in the conditions of confinement. For example, serious or unsupportable charges have been brought and the harshest penalties im-

79. "The Passport System of the U.S.S.R." and "Certain Instructions Concerning Registration" were adopted by the Council of Ministers of the Supreme Soviet on August 28, 1974. Boim, *The Passport System in the U.S.S.R.*, 2 REV. SOCIALIST L. 15 (1976). The purposes of the passport system are: (1) to provide documentation for administrative identification; (2) to facilitate supervision of population movement and dispersal throughout the country, in addition to requiring a registration document (*propiska*) for people entering one area or region from another; and (3) to aid supervision by internal security organs. *Id.* at 41.

80. In addition to ensuring proper identification of Jews, recording of nationality has been preserved in the new passport system to prevent members of other nationalities from "becoming" Jews so as to submit applications for emigration from the U.S.S.R., despite all the obstacles that exist. *Id.* at 41. Moreover, it is a tool to prevent the return to their native land of banished Crimean Tartars, who otherwise would be able to conceal their identity. *Id.*

81. See note 31 and accompanying text *supra*.

posed where the facts would support greater leniency.⁸² Further, the right to present a defense, guaranteed under Soviet law as evidence of a viable and developed legal system,⁸³ frequently is not available to political offend-

82. Such a case involved several Soviet Jews who illegally attempted to leave the U.S.S.R. in June of 1970 by commandeering a small plane and flying it to Sweden. Lapenna, *supra* note 58, at 82-83. The defendants could have been prosecuted under the conventional, relatively lenient charges of illegal exit abroad and perhaps extortion of state property. Criminal Code of the Russian Soviet Federated Socialist Republic, arts. 83, 95, in *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES* (Berman & Spindler trans. 1966) 183, 189 [hereinafter cited as RSFSR Criminal Code]. Instead most were tried for treason and theft of valuable government property—crimes carrying the maximum penalty of execution or fifteen years imprisonment. See RSFSR Criminal Code, *supra*, art. 23. See also Osakwe, *Analysis, supra* note 55, at 459-61; Comment, *The Death Penalty in the Soviet Union*, 5 AM. J. CRIM. L. 225, 226 (1977). Two defendants in the 1970 case were in fact sentenced to death, but the sentences were later commuted. The remaining defendants were sentenced to prison terms varying from four to fifteen years. Lapenna, *supra* note 58, at 83. For a detailed account of this case, see T. TAYLOR, *COURTS OF TERROR* 6-10 (1976).

In other cases, charges have been brought which have lacked factual bases. For example, a trial in Kishinev against nine Jewish dissidents was based on a charge of conspiracy to distribute subversive literature. Defendants were indicted for the crime of anti-Soviet agitation and propaganda. RSFSR Criminal Code, *supra*, art. 70. See note 144 and accompanying text *infra*. One commentator has concluded, however, that the literature at issue in this case could not reasonably be read as violating this provision. Dershowitz, *supra* note 53, at 257.

A final example is the case of Shkolnick, an uneducated Ukrainian Jew who applied for an exit visa and was subsequently arrested and charged with espionage for Great Britain. See RSFSR Criminal Code, *supra*, art. 65. This charge was based on evidence that Shkolnick had befriended several British scientists. The British denied any knowledge of Shkolnick, so the charge was changed to spying for Israel, even though the authorities failed to allege that he had had any contact with Israel. They argued instead that the defendant would provide Israel with secret information when he arrived. Shkolnick was eventually sentenced to seven years in prison. This decision implies that any espionage conviction can be justified if the evidence discloses that the defendant applied for an exit visa and continued to work in a factory that deals in materials or processes that might be useful to the Israeli government. Dershowitz, *supra* note 53, at 258. It also suggests that an indictment need not be supported by sufficient allegations of fact, and that the evidentiary standard for conviction is low, certainly less than guilt beyond a reasonable doubt. If the courts accept a lower evidentiary standard, they might be willing in such cases to give decisive weight to the conclusion of the prosecutor's office (*prokuratura*) that the accused is guilty. This practice would conflict with the admonition of Soviet criminal procedure that all participants in the criminal process—investigators, procurator and court—thoroughly investigate both sides of every case. See *Fundamentals of Criminal Procedure of the USSR and the Union Republics*, art. 14 in SAIFULIN, *supra* note 74, at 276 [hereinafter cited as USSR Criminal Procedure]. It also would violate Russian Criminal Procedure, which requires that courts base their decisions solely on the evidence presented at trial. Code of Criminal Procedure of the Russian Soviet Federated Socialist Republic, art. 301 in BERMAN, *supra* at 372 [hereinafter cited as RSFSR Criminal Procedure]. The procurator's belief as to defendant's guilt should not be considered at trial and, therefore, should have no bearing on the outcome. See Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 U.C.L.A. L. REV. 1203, 1221 (1968) [hereinafter cited as Fletcher]. For a discussion of the role of the *prokuratura* in the Soviet legal system, see Savitski, *Institutions for the Administration of Criminal Justice* in BASSIOUNI & SAVITSKI, *supra* note 7, at 16-29.

83. *Fundamentals of Legislation on the Judicial System of the USSR and the Union and Autonomous Republics*, art. 12 [hereinafter cited as USSR Judicial Legislation] in SAIFULIN, *supra* note 74, at 140; USSR Criminal Procedure, *supra* note 82, art. 13.

ers or to those being investigated by the Soviet secret police because of institutional restrictions on Soviet lawyers who represent or seek to represent clients in political trials.⁸⁴ Indeed, although the CPSU is receptive to the views of jurists, it severely restricts the independence of the legal profession.⁸⁵

Cases also have been reported in which the rights to present a defense and to present evidence on behalf of the accused were denied. Underlying most trials of Jewish dissidents, for example, is the charge of possessing and distributing anti-Soviet literature and propaganda.⁸⁶ Several such defendants have admitted distributing literature, but have denied that it was propaganda. Soviet courts have refused to hear that argument, however, holding the issue to be foreclosed by the *ex parte* determinations of experts in the secret censorship agency *Glavlit*. This procedural device violates the decree⁸⁷ of the Supreme Soviet that trial judges must not rely too heavily on the conclusions of experts and that all evidence bearing on the experts' conclusions should be reviewed.⁸⁸ Moreover, the substantive effect of this practice is to deny the accused the right to present a defense.⁸⁹ To these judicial tactics may be added the numerous reported instances in which defendants were denied the right to present any witnesses, a limitation in theory prohibited by Soviet criminal procedure.⁹⁰

84. Dershowitz, *supra* note 53, at 260-61. In such cases, only KGB-approved and Collegium of Lawyers-certified *advokats* are allowed to represent clients. These lawyers almost always urge clients to plead guilty and generally limit themselves to presenting personal arguments in mitigation of sentence. Such conduct disregards the requirement that defense counsel take all steps necessary to exculpate a defendant, to mitigate his or her responsibility, and generally to render all necessary legal assistance. See USSR Criminal Procedure, *supra* note 82, art. 23. Treatment of attorneys who wish to represent clients in politically sensitive cases can be very harsh. In the case of Feldman, for example, the *advokat's* name was removed from the list of practitioners because of his defense of a dissident Jew who sought to emigrate. Lapenna, *supra* note 58, at 82. Similarly, in the case of Shchransky, a Moscow attorney was approached by Shchransky's mother in June, 1977, to defend her son. This attorney agreed to undertake the defense but was expelled from the U.S.S.R. following an application for KGB approval. Caine, *Government of the Commissars for the Commissars*, 7 HUM. RTS. 21, 23 (1978).

85. Barry & Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1, 14-15 (1968) [hereinafter cited as Barry]. The Party influence historically has imbued the Soviet legal profession with a political orientation. In the early days of the Soviet State, the courts were urged to decide cases based on a flexible standard of the judge's "socialist conscience." Even as Soviet jurisprudence has developed, the CPSU has continued to stress the preservation of the political perspective. Accordingly, court decisions continue to conform to current Party policies. Nevertheless, no policy has been officially adopted that would promote uncertainty in the law through overbroad application of the codes. Instead, the trend has been toward stability, not flexibility. HAZARD, COMMUNISTS, *supra* note 5, at 89-91.

86. See RSFSR Criminal Code, *supra* note 82, art. 70.

87. Decrees or resolutions (*postanovlenia*) are one of four basic forms of legal acts issued by the Supreme Soviet and the highest governmental organs of the State. It is in the nature of an administrative regulation.

88. Dershowitz, *supra* note 53, at 262.

89. RSFSR Criminal Procedure, *supra* note 82, art. 19.

90. *E.g.*, *id.* arts. 46, 51 and 245. In the case of Kaminsky, for example, witnesses were interrupted when they began to present evidence favorable to the defendant. In some instances,

Denial of the right to present a defense and evidence are indicative of the manner in which principles of the Soviet legal system are manipulated to achieve results apparently favorable to the State at the expense of Soviet human rights commitments. The right to present a defense is closely related to the concept of a presumption of innocence. Although this presumption is not explicitly codified in Soviet law, a number of provisions exist, which, when read together, embody all of its guarantees.⁹¹ A defendant who cannot raise a defense or offer favorable evidence in response to charges is not presumed innocent, and his or her trial becomes a mere formality in which the court implicitly presumes guilt from the defendant's initial appearance. The role of the judiciary thus deteriorates into one that simply ratifies the criminal investigation, and the presumption of innocence, while theoretically available, is limited in practice.

The duty of the judge, prosecutor, and defense counsel to search objectively for the truth⁹² is another principle that is frequently restricted or misapplied. When a defendant is barred from presenting a defense or from introducing favorable evidence, those responsible for determining guilt or innocence have failed to act in a disinterested manner. Instead, the in-

they were forcibly removed from the courtroom in violation of the requirement that witnesses be examined by all participants, *id.* art. 283. See Dershowitz, *supra* note 53, at 261-62.

91. The chief difficulty in construing the presumption of innocence from Soviet codes is that most jurisdictions recognize a procedural connotation whereby the burden of producing evidence and convincing the tribunal of the guilt of the accused is imposed on the prosecution. Originally, the concept of burden of proof was regarded as only loosely applicable in the Soviet system and was not imposed on the courts, which always had been responsible for questioning the accused and witnesses. Berman & Quigley, *Comment on the Presumption of Innocence Under Soviet Law*, 15 U.C.L.A. L. REV. 1230, 1232 (1968) [hereinafter cited as Berman & Quigley]. The resolution of this difficulty took form in the USSR Criminal Procedure, *supra* note 82, which avoided the use of the term "presumption of innocence" but provided instead a lengthy list of provisions designed to prevent the accused from being convicted unless his or her guilt was established beyond a reasonable doubt. Berman & Quigley, *supra*, at 1232-33. This principle also is implicit in the CONSTITUTION, *supra* note 2, art. 160, which notes that "[n]o one may be adjudged guilty of a crime and subjected to punishment as a criminal except by sentence of a court and in conformity with the law." See generally Savitsky, *Protection of Human Rights in Criminal Procedure in U.S.S.R.*, 49 REVUE INTERNATIONALE DE DROIT PÉNAL 389 (1978) [hereinafter cited as Savitsky, *Protection*]. Nevertheless, there is the possibility that the court will assume the guilt of the accused based merely on finding that the *prokuratura*, the guardian of Socialist legality, believes in the defendant's guilt and commences prosecution accordingly. Although not codified in the legislative reform of 1958, the presumption of innocence is still an important principle of Soviet legal rhetoric and should thus exhort the court not to agree automatically with the prosecution. Fletcher, *supra* note 82, at 1214. It also reinforces the command that the pretrial investigator be thorough and impartial in preparing the case against the accused. *Id.* at 1214-15.

92. See Osakwe, *Due Process*, *supra* note 1, at 281. In theory, the Soviet system is inquisitorial rather than accusatorial. The judges, prosecution and defense are the main participants in the trial process and are bound to seek the truth as their primary duty. Both judges and prosecution are bound to bring out incriminating as well as exonerating aspects of criminal cases, while the defense counsel usually is in practice confined to seeking an acquittal or mitigation of punishment. *Id.* See also Savitsky, *Protection*, *supra* note 91, at 390.

criminating details of the case are emphasized, and the exonerating aspects are disregarded. Under present circumstances no member of this tripartite structure can be said to be working to defend the rights and legal interests of the accused in this class of cases.

The presumption of innocence and the duty of objectivity that is imposed on the legal profession are principles designed for the same purpose—the fair and evenhanded treatment of all persons accused of criminal offenses. This objective is sacrificed when the individuals who seek to invoke these principles are officially viewed as a threat to the State. In such cases, the ends of Socialism, rather than the protection of individual rights, assume priority.

In addition to discriminatory treatment within the trial setting, Soviet Jews also suffer human rights violations in the conditions of their penal confinement. Prisoners accused of criminal acts have been denied rights under Soviet law most notably during preinvestigative detention.⁹³ While Soviet law provides for a number of rights designed to safeguard prisoners from unfair or unduly severe deprivations, Jewish prisoners are often confined with and sometimes supervised by former Nazis who remain incorrigible anti-Semites.⁹⁴ They also are prevented from freely exercising their religious beliefs during incarceration, despite the guarantees of Soviet law.⁹⁵

93. One well known case of unlawful confinement is that of Shchransky whose dissident activities centered on promotion of the human rights provision of the Helsinki Final Act. His application for an exit visa to Israel in 1973 was denied on the grounds that he possessed state secrets. Shchransky was arrested in 1977, and as of February 20, 1978, he had neither been formally charged, nor allowed to communicate with family, friends or counsel. The Soviet secret police (the KGB) informed Shchransky's mother that he was being investigated on the charge of treason, an offense punishable by death. See *Fundamentals of Criminal Legislation of the USSR and the Union Republics*, art. 22, in SAIFULIN, *supra* note 74, at 246 [hereinafter cited as *USSR Criminal Legislation*]; RSFSR Criminal Code, *supra* note 82, art. 64. In addition, a special secret decree enacted by the Presidium of the Supreme Soviet extended by six months the time Shchransky would be held incommunicado and further investigated. It was probable that his trial would be held in secret because state secrets allegedly were involved. Caine, *supra* note 84, at 21-23. Although Soviet law provides for preinvestigative detention, under no circumstances is this to exceed nine months. *USSR Criminal Procedure*, *supra* note 82, art. 34. See Osakwe, *Due Process*, *supra* note 1, at 376-77. Shchransky has been confined for more than the limit prescribed by law. There is also no provision in Soviet law permitting the incommunicado confinement of persons accused of crimes. Moreover, the secret decree by which Shchransky's period of confinement was extended, while not a literal violation of Soviet law, was nevertheless an abuse of authority, for it had the effect of denying him the fundamental guarantees of Soviet law. The possibility exists that an illegal secret trial will be held, in light of the failure to make formal charges. Finally, Shchransky's inability to procure counsel means that Soviet authorities have been unchecked in their treatment of him so that violations of his rights will continue to go undetected. See *USSR Criminal Procedure*, *supra* note 82, art. 22 (providing that defense counsel is allowed to participate in the case when the accused is informed of the completion of the preliminary investigation).

94. Dershowitz, *supra* note 53, at 262.

95. *Id.* at 263. Restrictions on this right must be reasonably related to the administration of the prison. *Id.*

The Soviet government's disregard for the due process rights of Jews, besides being contrary to Soviet domestic law, also falls short of certain international obligations, the most significant of which are set forth in the Covenant on Civil and Political Rights. The Covenant provides that no one shall be arrested or detained arbitrarily, that anyone arrested be promptly informed of the charges, and that anyone arrested and detained shall be entitled to a trial within a reasonable period of time or be released.⁹⁶ It also requires that all persons tried for criminal offenses are entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law, that they be allowed to present a defense and communicate with counsel of their choice, and that they be permitted to present witnesses on their behalf.⁹⁷

Additional evidence of the Soviet Union's purported commitment to due process guarantees is found in the Standard Minimum Rules for the Treatment of Prisoners,⁹⁸ for which it voted on July 31, 1957.⁹⁹ Although the Rules were passed as a U.N. resolution and thus are only recommendatory,¹⁰⁰ they nevertheless evidence the Soviet Union's theoretical recognition that the interests of individual prisoners rise above those of prison authorities who may be unduly oppressive in maintaining order. Specifically, the Rules provide that punishment shall not be inflicted unless the prisoner is informed of the alleged offense and given an opportunity to present a defense.¹⁰¹ Prisoners also are to be allowed to communicate with family and friends¹⁰² and to practice their religion freely.¹⁰³

At the most fundamental level, none of the ends of Socialist legality¹⁰⁴ are served by violating the due process rights of Soviet Jews. The organizational integrity of society is not strengthened, because these violations occur in spite of legally-defined social relationships. Further, conflicts are not resolved in a consistent and predictable manner, because the legal prescriptions for resolution are circumvented. The accused or convict is not reeducated, but instead suffers such terrible indignity that resocialization becomes impossible. Finally, the "punishment" imposed either before trial or following conviction is hardly justifiable as a deterrent to illegal conduct, for the punishment itself is not provided by law. These violations of due process are, in short, violations of Socialist legality. In essence, they are contrary to Marxist-Leninist morality, with which the law of the U.S.S.R. is said to be inextricably bound.

96. International Covenant on Civil and Political Rights, *supra* note 26, art. 9(1)-(3).

97. *Id.*, art. 14(1), (3).

98. E.S.C. Res. 663 C XXIV (1957) [hereinafter cited as Rules].

99. Dershowitz, *supra* note 53, at 263.

100. BRIERLY, *supra* note 11, at 380-84, 387-88. Cf. U.N. Charter arts. 10-11 (providing that the functions and powers of the General Assembly are confined to debate and the making of recommendations).

101. Rules, *supra* note 98, para. 30(2).

102. *Id.*, para. 37.

103. *Id.*, paras. 41 and 42.

104. See note 7 *supra*.

*Treatment of Other Soviet Minorities**a. Indigenous Peoples*

Long-standing Soviet policy aims at creating a federation of indigenous nationalities in which once-backward peoples develop economically and culturally at an accelerated pace. This goal, as envisioned by the Russian-dominated Soviet government, establishes the foundation for the relationship between the federal government and its constituent nation-states (the Union Republics) and between lesser political subdivisions.¹⁰⁵ In this evolutionary process, the Soviet government often fails to protect the human rights of many national, ethnic, religious and linguistic groups.

The policy of federation springs from the Marxist-Leninist goal of organizing every nation's economic forces, thereby transforming citizen behavior and attitudes so that values necessary to hasten the advent of Communism are internalized. The primary function of law in this evolutionary social phase is twofold. First, it promotes social organization through definition of legal relationships and delineation of normative legal standards. It also designates behavior deemed contrary to Communist principles and thereby refines mass education.¹⁰⁶ Those who deviate from the law, therefore, not only infringe upon the interests of other individuals, but also pose an actual threat to the success of Party policies.¹⁰⁷

Practical application of these principles has led to government repression of non-Slavic groups, especially Islamic peoples and nomadic tribes of Central Asia, whose behavior is viewed as incompatible with Soviet standards. To promote the general goal of socialist transformation, the Soviet government has achieved modification of the behavior of these groups by declaring disfavored customs to be what one commentator has termed "traditional

105. See CONSTITUTION, *supra* note 2, art. 76. The Constitution describes each Union Republic as "a sovereign socialist Soviet state." The Soviet Union today consists of a federation of fifteen Union Republics. The name of each Republic is derived from its majority population. In theory, the Union Republics are equal, sovereign, and free to develop as they choose. The purpose of federation is to ensure fraternal cooperation among the peoples. Federation is evidenced by the existence of organs of state power and state administration, common armed forces, citizenship, budget, and monetary and credit systems. The powers of the Union Republics are vested in their own constitutions, which take account of special local features but ultimately must conform to the Constitution of the U.S.S.R. In the event of a conflict, both the federal constitution and federal legislation are supreme. THE SOVIET STATE AND LAW 96-102 (V. Chkhikvadze ed. 1969) [hereinafter cited as THE SOVIET STATE AND LAW]. Besides the Union Republics, there are twenty Autonomous Republics, sixteen of which are in the Russian Soviet Federated Socialist Republic (R.S.F.S.R.). The Autonomous Republics are Soviet socialist states that are part of and subordinate to the Union Republics. Also subordinate to the Union Republics are the Autonomous Regions, which are national territories within the Union Republics and are inhabited by a distinct nationality preserving its own way of life. Finally, the National Areas provide small nationalities with administrative self-government in domestic affairs. *Id.* at 109-11.

106. See note 5 and accompanying text *supra*.

107. David, *supra* note 5, at 196-97.

crimes.”¹⁰⁸ Prosecution for such offenses does not depend upon a victim's complaint, but rather upon conduct which conflicts with established policies.¹⁰⁹

Prosecution for traditional crimes also has deprived some minorities¹¹⁰ in the U.S.S.R. of rights protected, by implication, under international law. Such legal action weakens the physical integrity of these groups, thus making discrimination, when it exists, easier to practice and more difficult to detect.¹¹¹ Ironically, the traditional crimes approach, by prohibiting certain customary practices, has resulted in greater legal protection for certain classes within non-Slavic minorities, particularly Islamic women.¹¹²

108. Feldbrugge, *Criminal Law and Traditional Society: The Role of Soviet Law in the Integration of Non-Slavic Peoples*, 3 REV. SOCIALIST L. 3 (1977) [hereinafter cited as Feldbrugge, *Traditional*].

109. The policies that this legislation sought to advance are based on an ideological framework adhered to by Soviet authorities, who view Socialism and Communism as stages in inevitable social progress. Thus, they are intolerant of what is regarded as backwardness. If initial attempts at education and persuasion fail, force and repression are the last resorts. By characterizing non-Slavic customs as “crimes” punishable under Soviet law, society will be free of customs such as buying brides, the practice of polygamy or paying blood money (as a consequence of intertribal feuds). *Id.* at 10-11. The advancement of these policies also has meant that the Soviet government shows greater interest in over-all social and political effects than in individual welfare. *Id.* at 15-16.

110. Soviet minorities can be categorized in three ways recognized by international law: ethnic, religious and linguistic. See International Covenant on Civil and Political Rights, *supra* note 26, art. 27. A minority also can be described as ethnic and religious, *e.g.*, Soviet Jewry, as well as ethnic and linguistic, *e.g.*, Germans dispersed over the whole territory of the U.S.S.R. and lacking any coherent territorial unit. Uibopuu, *Minorities*, *supra* note 44, at 219.

111. The right to preservation of separate identities of minorities has been defined as “the right to preserve the characteristics which distinguish a group from the majority—their traditions and racial peculiarities.” Although neither U.N. Covenant makes such an express distinction, certain U.N. treaties and conventions can be interpreted as preserving the separate identities of minorities. See, *e.g.*, International Covenant on Civil and Political Rights, *supra* note 26, art. 27; Convention against Discrimination in Education, December 14, 1960, 429 U.N.T.S. 94, art. 5, § 1, para. c; International Covenant on Economic, Social and Cultural Rights, *supra* note 27, art. 13(3). See Uibopuu, *Minorities*, *supra* note 44, at 220.

112. While the traditional crimes approach has weakened the social and cultural integrity of certain indigenous groups, the position of women, especially in Islamic societies, has been improved by prohibitions against behavior which affected the free choice of women to marry. Thus, the acquisition of a wife through payment of a bride price (*kalym*), in those parts of the U.S.S.R. where Islam prevails, was outlawed. Feldbrugge, *Traditional*, *supra* note 108, at 17-18. Other means of forcing a woman to marry against her will were also proscribed. These included offenses for marrying a woman who was not sexually mature or had not reached marriageable age, or for concluding contracts regarding a future marriage of children under age. It was also criminal to prevent a woman from marrying the man of her choice or to force her to leave her husband. *Id.* at 19. Bigamy and polygamy also are regarded as traditional crimes, but the attitudes of Soviet authorities toward suppression of such behavior has not been as relentless. *Id.* at 21. Similarly, men have been regarded as victims of traditional crimes, primarily through inter-tribal feuds, the central offense of which is the blood-feud (revenge for the killing of a relative by killing a member of a rival tribe). *Id.* at 22-23. These crimes are dealt with through a pacification commission which mediates disputes. These also are dealt with as common crimes such as homicide, manslaughter, assault and battery, etc. Another traditional of-

Other Soviet government practices directed toward limiting autonomy of Soviet minorities have few corresponding beneficial effects. For instance, the right to an education in one's own language (and to official use of one's native language), enjoyed by most nations and nationalities of the U.S.S.R., is denied to people who are dispersed throughout the country, such as Jews and Germans.¹¹³ Systematic religious training for minors is governed by article 142 of the RSFSR Criminal Code,¹¹⁴ which forbids the establishment of institutions for religious instruction of children.¹¹⁵ Strict enforcement of

fense is the custom among nomadic tribes of Central Asia of seizing cattle without the intention of appropriating them. *Id.* at 23. This practice was originally a way of enforcing a claim in a society which had no central authority to do so. *Id.*

The Soviet Union has been very successful in the prevention and suppression of traditional crimes. The only contemporary criminal code of a Union Republic that still retains provisions against such conduct is that of the Russian Federated Socialist Republic. The reason is that these crimes still occur frequently within the Republic. *Id.* at 40. Thus, because traditional crimes are no longer listed in the criminal codes of most Union Republics, their legal disappearance has occurred, although some commentators believe that they have not in fact been totally eradicated. Such crimes continue to exist in isolated pockets of the larger regions of the U.S.S.R., which means that they still exist in predominantly Islamic parts of Central Asia though now camouflaged by the less-easily penetrated defenses of the family. *Id.* at 39. *See also* DAVID, *supra* note 5, at 443.

The efforts by the Soviet government to eradicate traditional crimes are pointed to as evidence that the Soviet system will eventually eliminate all crime. *See* DAVID, *supra* note 5, at 160. Moreover, the Soviet government's success in combatting this behavior is at least arguably a positive achievement in advancing human rights. It can be said that the elimination of traditional crimes is consonant with article 35 of the Soviet Constitution which guarantees the equal rights of men and women, and of Articles 2 and 3 of both U.N. Covenants, *supra* notes 26-30, which together provide that all men and women shall have equal social, economic, cultural, and political rights. The struggle against traditional crimes has been coordinated with massive economic and financial assistance from the federal government to "backward" Republics. This assistance is reflective of the socialist nature of the national policy, the main premise of which is that economic equality is a necessary precondition to all other forms of equality. *See* THE SOVIET STATE AND LAW, *supra* note 105, at 107. It is pointed out, however, that one important reason for the decline in the frequency of traditional offenses is that an urban and an industrial system has replaced the more ancient and traditional cultures where these behaviors prevailed. Feldbrugge, *Traditional*, *supra* note 108, at 37-39. Another commentator argues that the highly regimented Soviet society has aims that are so rigid that many people are unable to subscribe. Thus, they seek alternatives and run afoul of the law, usually in the form of spontaneous offenses in the area of general delinquency and thereby offset the gains made in combatting traditional crimes. Shtromas, *supra* note 53, at 305-06.

113. Uibopuu, *Minorities*, *supra* note 44, at 220-21. The use of native languages by minorities is regarded by Soviet commentators as an integral feature of minority group autonomy, which is defined as the "independent exercise of state power and broad self-government." THE SOVIET STATE AND LAW, *supra* note 105, at 108. Autonomy is said to be expressed through local organs of power, the courts, administrative bodies, schools and socio-political institutions. Native languages are authorized as the medium of expression in each of these spheres. *Id.*

114. *See* note 82 *supra*.

115. Uibopuu, *Minorities*, *supra* note 44, at 221.

this provision creates another means by which religious minorities, especially Jews and Baptists, can be persecuted.¹¹⁶

Forced population dispersal also furthers government economic and social policies. For example, Volga Germans were dispersed under Stalin and were refused permission to return to their native land by Krushchev because the government perceived them as a threat to Soviet political power.¹¹⁷ Similarly, Tartars, previously uprooted from their native Crimea, were forcibly removed and deported when they sought to return. They also were tried for various crimes during the period of Stalinist renunciation.¹¹⁸ As certain populations were scattered, massive government-supported immigration of non-indigenous persons took place, diluting the native populations and threatening their group identity. This practice suggests that the Russian-dominated U.S.S.R. has become a melting pot rather than, in accordance with express Soviet policy, a multinational state comprised of a federation of free, equal, and distinct peoples.¹¹⁹ The Soviet policy of forced population dispersal has thus had the effect of impairing the right of all peoples under international law to the preservation of their group identity.

116. For a discussion of the persecution by Soviet authorities of Jews, Baptists, and other minorities, see Grzybowski, *Socialist Legality and Uncensored Literature in the Soviet Union*, 10 CASE W. RES. J. INT'L L. 299, 301-04 (1978) [hereinafter cited as Grzybowski, *Uncensored*].

117. *Id.* at 303. Five nations punished by dispersal were allowed to return to their native lands: the Balkars, Kalmyks, Karachais, Chechen and Chechen-Ingush. Along with rehabilitation of dispersed nations, decrees ordering uprooting and dispersal were abolished under Krushchev. *Id.*

118. *Id.* at 302-03. The plight of Crimean Tartars who tried to return to their homeland aroused sympathy in the U.S.S.R. Uncensored magazines reported on the trials of Tartars subjected to criminal prosecution, and Tartar appeals to government authorities were widely circulated. Some dissidents who espoused this cause were placed in psychiatric institutions. *Id.* at 303. See generally notes 174-187 and accompanying text *infra*.

119. Uibopuu, *Minorities*, *supra* note 44, at 221. Examples of mass immigration are the following:

1. The City of Riga, where in the 1970 census, Russians had attained a clear majority over native Latvians.
2. Percentages of Russians in some Union Republics and Autonomous Republics increased considerably from 1959 to 1970.
 - a. Ukrainian S.S.R. increased from 16.9% to 19.4%.
 - b. Latvian S.S.R. increased from 26.6% to 29.8%.
 - c. Estonian S.S.R. increased from 20.1% to 24.7%.
 - d. In the Karelian Autonomous Republic where Karelians decreased from 13.1% to 11.8%, the number of Russians increased from 63.4% to 68.1%.
 - e. In the Komi Autonomous Republic, the Komi declined from 30.1% to 28.6%, while Russians increased from 48.6% to 53.1%.

Id.

Also, the 1970 census figures demonstrated a "clear overweight" of Russians in certain Union and Autonomous Republics, although this is not so in the majority of cases. In the Kazakh Union Republic, there were 42% Russians and 32% Kazakhs. Similar figures occur in the Bashkir, Karelian, Mordovian, Udmurt and Yakut Autonomous Republics. The most extreme imbalance occurred in the Jewish Autonomous Region with 145,000 Russians and 11,500 Jews.

Minority group discrimination appears also in the overrepresentation of Russians in the higher organs of state government. Representation of other nationalities, which should have a voice at all levels of the decision-making process, is severely limited.¹²⁰ Further, because minorities are generally excluded from the Communist Party, certain positions in Soviet society available only to Party members are effectively closed to most nationalities except Russians.¹²¹ Party membership restrictions thus deny minorities any meaningful control of their own Union Republics.¹²²

Uibopuu, *Soviet Federation and the New Soviet Constitution*, 5 REV. SOCIALIST L. 171, 181 (1979) [hereinafter cited as Uibopuu, *Federalism*].

In at least two cases, according to one Soviet commentator, population shifts have been attributable to industrial development. The population of Kazakhstan after 1959 was 29.6% Kazakhs and 43.1% Russians. This difference is said to be due to the transfer of many factories from the central areas of the U.S.S.R. to Kazakhstan, to new construction projects and the reclamation of land for agriculture. Similarly, large numbers of Ukrainians have immigrated to Siberia in the R.S.F.S.R. to work on hydroelectric power plants and major industrial enterprises. THE SOVIET STATE AND LAW, *supra* note 105, at 97.

The structure of the Soviet State purportedly reflects distinctions in nationalities underlying the Soviet federation. The highest organ of State, the Supreme Soviet, recognizes national differences in its two constituent chambers: the Soviet of the Union and the Soviet of Nationalities. The latter is said to represent the specific interests of all Soviet nationalities in matters of the economy, culture, customs and traditions. *Id.* at 98. The principle of a federated, multinational state, entered into on a voluntary and equalitarian basis and in the spirit of fraternal cooperation, is in theory fundamental to the concept of the Soviet State. *Id.* at 90-91. See also Uibopuu, *Federalism*, *supra*, at 178 (pointing out that this principle is reiterated in the 1977 Constitution). See generally note 105 and accompanying text *supra*.

120. According to one Soviet commentator, the constituent Republics of the U.S.S.R. participate equally in state organs regardless of population or territory. Each Union Republic has an equal number of deputies in the Soviet of Nationalities and its own representatives in the Presidium of the Supreme Soviet, the U.S.S.R. Council of Ministers, and the U.S.S.R. Supreme Court. Equal representation is regarded as vital in the administration of specific interests of the Union Republics by the Soviet government. THE SOVIET STATE AND LAW, *supra* note 105, at 98-99. Overrepresentation of Russians is unlikely to produce equal representation or effective promotion of non-Russian interests. Instead, there is likely to be wider support for the policies of the Russians, who dominate all central organs of state power.

121. Uibopuu, *Minorities*, *supra* note 44, at 222. For example, the national origin of the members of the U.S.S.R. Council of Ministers in 1976 was 53 Russians, 18 Ukrainians and 8 nationals of other groups. The ethnicity of the Soviet Communist Party shows overrepresentation of Russians, Georgians and Armenians in relation to their percentage in the U.S.S.R. population. Another example dates back to the mid-1960's when Russian Jews attained the highest Party membership among all nationalities of the U.S.S.R., but now are among the most underrepresented national group in local Soviets of the U.S.S.R. along with Germans, Poles, Koreans, Greeks and Bulgarians. Additionally, the most underrepresented nations in the Communist Party are Moldavians, Turkmen and Tadzhiks. The ratio between the best represented nations and the worst is more than three to one. In Lithuania, Russians make up 8.6% of the population but comprise 27% of the Republic's Communist Party Central Committee, 10% of the representatives of Lithuania to the U.S.S.R. Supreme Soviet, and 23% of the Deputies in the Lithuanian Supreme Soviet. In Tadzhikistan, Russians make up 11.9% of the population, but comprise 24% of the membership of the local Communist Party. *Id.* at 222-23.

122. Underrepresentation of minorities in the CPSU and the resulting exclusion from the decision-making process also denies them the enjoyment of their cultural rights and inhibits their cultural survival as minorities. *Id.* at 223.

The Soviet Constitution purports to recognize the need for minority representation of the Union Republics. The Constitution grants them a special position in the Soviet system in several ways, the most important of which is recognizing their status as sovereign states (article 76). Along with national status, the Constitution expressly provides the Republics with the incidents of statehood, including the rights to: control boundaries and territorial subdivisions (articles 78 and 79); conclude treaties, exchange diplomatic and consular representatives, and join international organizations (article 80); and secede from the U.S.S.R. (article 72). The Constitution also permits Republics a voice in decision-making processes of the state organs and allows them control of economic and social development within their territorial boundaries (article 77). In reality, however, central control exercised by the federal system is so pervasive that the Union Republics are effectively incapable of exercising their rights. Further, they lack the essential elements of statehood, including a distinct population, a defined territory, an autonomous government, and the ability to honor international obligations.

Territorial definition of the Union Republics is similarly absent in any practical sense, for the Constitution protects the territorial unity of the U.S.S.R. (article 70). Further, the relative legislative powers of both the U.S.S.R. and Union Republics, as well as the centralized Party structure, largely nullify the right of statehood granted in article 76 of the Constitution.¹²³ Indeed, these factors combine to negate the presumption of statehood as recognized by international law. Unfortunately, the above articles do not presuppose a territory upon which an autonomous state and its supporting structures can be established.¹²⁴ Moreover, the Union Republics are not sufficiently self-governing to be regarded as independent because all crucial legislative matters are entrusted to the federal government.¹²⁵ Finally, the Union Republics have failed to demonstrate competence to carry

123. See Uibopuu, *International Legal Personality of Union Republics of U.S.S.R.*, 24 INT'L & COMP. L.Q. 811, 820-22 (1975) [hereinafter cited as Uibopuu, *Personality*].

124. *Id.* at 816-17. See generally Crawford, *supra* note 28, at 111.

125. Uibopuu, *Personality*, *supra* note 123, at 821-22, 824. These matters include foreign relations, federal military powers, admission of new members into the Union, protection of public order and state security, and control of the nation's economy and federal budget. See CONSTITUTION, *supra* note 2, art. 73. The sovereignty of the U.S.S.R. in its relations with the Union Republics also is evident from the following:

1. the constitutions of the Union Republics must conform to the U.S.S.R. Constitution;
2. Soviet law prevails in the event of a conflict;
3. the Presidium of the Supreme Soviet is empowered to annul enactments of the Union Republics' Councils of Ministers; and
4. the Union Republics are subject to certain "guiding principles" in their external relations and military organization.

THE SOVIET STATE AND LAW, *supra* note 105, at 101. The Union Republics are effectively deprived of the ability to govern a given territory, except for authority allocated by the federal government, and thus prevented from exercising the right of self-determination. See Crawford, *supra* note 28, at 116-19. See also Uibopuu, *Federalism*, *supra* note 119, at 174-76.

out international obligations, although some have sought to do so by establishing organs for their international representation.¹²⁶

The greatest disparity between the Soviet treatment of ethnic minorities and Union Republics and its obligations under international law is found in its failure to grant either the minorities or the Republics the right of self-determination.¹²⁷ This right as embodied in article 1 of the U.N. Covenants provides that all people are free to determine their political status and pursue their own economic, social, and cultural development. One commentator regards this right as applicable "to all people of a certain amount of population forming an ethnical unit and living in a common territory."¹²⁸ Based on this interpretation, he argues that article 1 of the U.N. Covenants should be considered indispensable to the enjoyment of all other rights provided for by the Covenants, and consequently that the right of self-determination should be granted to national minorities.¹²⁹ Soviet minorities also should benefit from internally guaranteed "collective" human rights as members of the Soviet population as a whole. Because all Soviet citizens are

126. Uibopuu, *Personality*, *supra* note 123, at 831, 842. For example, the Ukrainian and Byelorussian S.S.R. have sought to assume international obligations by virtue of membership in various international organs. *Id.* at 832. They also have entered into multilateral treaties, but have never become parties before the U.S.S.R. This fact reflects the Soviet Union's right to determine basic foreign policies of the Union Republics. *Id.* at 835. In any event, the other Union Republics have to date concluded very few international treaties and are members only in a few international nongovernmental organizations. They are thus not on the same legal footing as the Ukraine and Byelorussia, which themselves are only limited international legal persons, mainly by virtue of their membership in the U.N. *Id.* at 842-43. The capacity to carry out international obligations results from the combined factors of government and independence. A government must not only have the power to accept such obligations, but no other entity must carry out or accept this responsibility for it. If the lack of independence is complete, the entity concerned is not a state at all, but internationally an indistinguishable part of a dominant state. Therefore, because the Union Republics cannot be considered territorial entities and because they lack the actual power to enter into relations with other states, they fall short of meeting the criteria for statehood in international law. *See* Crawford, *supra* note 28, at 119-20, 139.

127. *See* note 28 and accompanying text *supra*. The Union Republics might well exercise the right of self-determination by freely choosing to remain within the Soviet federation, but because of the limited enjoyment of this right, an accurate assessment of the Union Republics' voluntary commitments to federation cannot be made. Although article 29 of the Constitution adopts the concept that international law governs the relations between the U.S.S.R. and other nations, it does not refer to the right of self-determination, but only vaguely mentions the right of peoples to determine their own fate.

128. Uibopuu, *Minorities*, *supra* note 44, at 224. An alternative interpretation is that the right of self-determination applies primarily to people under colonial and other forms of alien subjugation, domination, or exploitation. This is the prevailing U.N. practice. *Id.* at 225. Likewise the U.S.S.R. has argued that the U.N. Covenants apply only to colonial peoples, but as a signatory to the Helsinki Final Act, which serves as an auxiliary interpretative device, the Soviet Union could be estopped from unilaterally interpreting self-determination only in favor of colonial peoples. Also, both U.N. Covenants' provisions must be determined by the practices of all states. *Id.* *See generally* Crawford, *supra* note 44, at 150-52.

129. Uibopuu, *Minorities*, *supra* note 28, at 150-52.

entitled to the human rights embodied in the U.N. Covenants and other international instruments, it follows that Soviet minorities should be equally entitled.

The main participants in the conduct of public affairs, however, including the free determination of political, economic, and cultural rights, are those who serve as government officials and Party members.¹³⁰ Thus, both the majority of the Soviet people and the ethnic minorities encompassed therein are denied full enjoyment of these indispensable rights. This stark reality is antithetical to the ideals of Marx and Lenin, who envisaged control of the State by the wisest during society's evolution to Communism, but never contemplated the mastery of one nationality over all others.¹³¹ The quest for centralized federal dominion likewise inspires the State to reject the principle, thought to be fundamental, that the Soviet Union should consist of a federation of juridically equal nationalities.¹³² It is disingenuous of the U.S.S.R. to represent to the world community respect for the right of self-determination when in practice this right is ignored within the U.S.S.R.

b. *The Legal Status of Aliens*

Aliens are perhaps the least visible minority within the Soviet legal system, but they are recognized under Soviet law, and thus acquire both rights and duties. Article 37 of the Constitution guarantees aliens certain rights and freedoms provided by law, including recourse to the courts and other governmental bodies. These basic civil rights also are protected by the U.S.S.R. Civil Code, except where exercise of the rights would contradict the purposes of Socialist society.¹³³ The Civil Code extends these rights to aliens by granting them legal capacity equal to that of Soviet citizens. Significantly, however, the rights of aliens are subject to the power of the federal government to impose restrictions by law.¹³⁴ Additionally, while the Civil Code provides that rules established under treaties or other international agreements shall apply to aliens, these rights can be preempted by Soviet civil legislation or the legislation of a Union Republic.¹³⁵ As a practical matter,

130. HOUGH, *supra* note 4, at 362-63.

131. See notes 5-6 *supra*.

132. See THE SOVIET STATE AND LAW, *supra* note 105, at 90-91.

133. Fundamentals of Civil Legislation of the USSR and the Union Republics, arts. 5, 6 in SAIFULIN, *supra* note 74, at 153-54 [hereinafter cited as USSR Civil Code]. It appears that article 5 may be used to either support or deny the participation of the Soviet government, including the judiciary, in the protection of the civil rights of aliens where the exercise of these rights either conforms or conflicts with Socialist purposes. Comment, *The Civil and Political Rights of Aliens in the U.S.S.R.: A Survey of Soviet Legislation*, 11 TEX. INT'L L. J. 571, 577 (1976) [hereinafter cited as *Rights of Aliens*]. Moreover, the Civil Code extends to aliens the constitutional rights of free speech, press, assembly and street processions to the degree that the exercise of these rights does not threaten or offend the State. *Id.* at 592. See USSR Civil Code, *supra*, art. 122.

134. USSR Civil Code, *supra* note 133, art. 122.

135. *Id.* art. 129.

therefore, the Soviet system is potentially as harsh for aliens as for other minorities, despite the apparent liberality of the Civil Code.¹³⁶ The Supreme Soviet, as the preeminent legislative body,¹³⁷ is unwilling to submit to foreign interpretation of its international obligations with respect to aliens or to permit judicial control over legislation.¹³⁸ Such a concession obviously would entail weakening the Soviet government's sovereignty over domestic affairs.¹³⁹ The treatment of aliens is, therefore, fundamentally consistent with the treatment of other minorities.

The power of the Soviet Union to restrict the scope of alien rights limits the extent to which internationally recognized civil rights expressed as human rights apply to aliens in the U.S.S.R. Under international law the rights of aliens are protected by article 2 of the Covenant on Civil and Political Rights, which provides that all individuals within the territories of the contracting parties and subject to their jurisdiction are to enjoy the rights embodied in the Covenant without distinction of any kind. Article 2 will have slight significance for aliens in the U.S.S.R. until the rights of Soviet citizens are fully implemented and until the Soviet government recognizes the accepted international standard forbidding the unilateral interpretation of human rights principles.¹⁴⁰

In summary, world opinion must be drawn to the plight of Soviet minorities and to the fictional sovereignty of the Union Republics.¹⁴¹ Failure to do so will mean continued disregard for minorities' rights and nominal independence for the Republics. Faced with these prospects, it is necessary that the world community employ all available mechanisms to force greater Soviet compliance with its human rights obligations.

Treatment of Dissidents

The term "dissident" can be broadly defined to encompass those individuals whom the Soviet government officially regards as actively resistant to the

136. The Soviet civil codes contain general provisions concerning the procedural rights of aliens and stateless persons created by the application of the civil law of foreign countries, decisions of international courts and international treaties and agreements. In particular, these provisions embody treaty principles and international law. USSR Civil Code, *supra* note 133, art. 129; Fundamentals of Civil Procedure of the USSR and the Union Republics, art. 64 [hereinafter cited as USSR Civil Procedure] in SAIFULIN, *supra* note 74, at 231. Thus, these articles constitute statutory recognition by the Soviet Union of international obligations with respect to aliens within Soviet territory. Blishchenko, *supra* note 12, at 822.

137. See note 4 *supra*.

138. See DAVID, *supra* note 5, at 211, 243-44.

139. See Hazard, *Tactics*, *supra* note 15, at 28. By limiting the capacity of aliens to that of Soviet Citizens, the Supreme Soviet seeks to prevent, by means of the USSR Civil Code, *supra* note 133, art. 122, the intrusion of any foreign minimum standards of civil rights and thereby to protect Soviet government sovereignty. *Rights of Aliens*, *supra* note 133, at 579-80.

140. See note 12 *supra*.

141. See notes 212-215 and accompanying text *infra*.

security and implementation of the Communist Party's policies.¹⁴² Contemporary practices designed to repress dissent include "dissidents' clauses," other vague provisions of the criminal codes, closed, unpublicized trials, employment discrimination, psychiatric confinement, and abuse of penitentiary law. In many instances, these practices do not involve a breach of Soviet domestic law, but they nevertheless constitute violations of human rights.

a. Vague Statutory Provisions and Secret Trials

Although the overriding principle of legality—*nullum crimen, nulla poena sine lege*—was formally introduced into the Soviet legal system with the legislative reform of 1958,¹⁴³ the special provisions of many criminal codes remain so vague as to permit a finding of criminal liability for practically any conduct regarded by the authorities as socially dangerous. One example is the prohibition against anti-Soviet agitation and propaganda, the so-called "dissidents' clause,"¹⁴⁴ used to repress political opposition. The government

142. This definition serves to identify a trait common to all individuals whose human rights are violated as a result of their insistence that the Soviet government live up to its legal obligations. Oppression of dissents is one means of manipulating the Soviet legal system to gain universal conformity without inspiring the overt terror of the Stalinist era. Defining "dissident" in this way also obviates the problem of identifying the Party's unofficial attitude toward an individual, as well as the motivation for his or her alleged illegal activities. Because of the secrecy which often surrounds the trial and imprisonment of dissidents, this information is difficult to ascertain from outside sources. See notes 53-54 and accompanying text *supra*.

143. See generally Bassiouni, *The Criminal Justice System of the Union of Soviet Socialist Republics and the People's Republic of China*, 11 REVISTA DE DERECHO PUERTORRIQUENO 164 (1971) (arguing that the principle of legality was weakly embodied).

144. RSFSR Criminal Code, *supra*, note 83, art. 70. The intention on the part of the accused to weaken or subvert the Soviet regime is an essential element of this crime. Thus, an individual who collects and maintains material which is anti-Soviet in nature but who has no wish to disseminate this information—for example, by merely keeping a diary—is not guilty of a violation of Article 70. Additional to an intention to weaken the Soviet state, the offense also requires that the material in question be anti-Soviet in substance. To the western lawyer, Article 70 appears to conflict with the free speech provision of Article 50 of the Constitution. Soviet jurists respond by noting that the exercise of free speech, as stated in Article 50, must be "[i]n accordance with the interests of the people and in order to strengthen and develop the socialist system" Freedom of speech thus is not an absolute right under Soviet law, but must yield when the "interests of the people" or the "socialist system" is found to outweigh it. It may be argued, however, that these interests are advanced by encouraging, rather than repressing, free speech. Further examination reveals a second weakness of Article 70, its vagueness and overbreadth. Given its present formulation and that of Article 50 of the Constitution, it is unclear when speech unfavorable toward the Soviet state, whether by word of mouth, in print, or through artistic expression, is constitutionally protected. Article 70 also requires investigative bodies to inquire into the personality and moral philosophy of persons accused thereunder in order to determine if the intent requirement is satisfied. This procedure seems to invite a return to the concept of guilt by association, which has been discredited in the Soviet system. For these reasons, Article 70 is well suited to the repression of dissent in the Soviet Union. See Osakwe, *Analysis, supra* note 55, at 465-67.

also uses special decrees (*postanovlenia*)¹⁴⁵ to amend criminal codes, with the result that subsequently imposed penalties may be harsher than those prescribed at the time of the offense, or that authorities may be acting in what previously would have been an illegal or extra-legal manner.¹⁴⁶

Another vaguely worded enactment invoked against dissidents, especially between 1957 and 1970, is the so-called anti-parasite legislation.¹⁴⁷ This law has been interpreted by the Presidium of the R.S.F.S.R. Supreme Soviet to include as "parasites": (1) those who do not honestly work according to their abilities, or obtain unearned income, or are guilty of anti-social acts, and (2) those who take jobs in enterprises, offices, or on *kolkhozy* (collective farms) only for the sake of appearances, while in fact leading a parasitic way of life.¹⁴⁸ Before 1965, the penalty for this crime was expulsion to specially designated places for a term of two to five years with the obligation to work at such localities and to forfeit "unearned property." The legal standards for "parasitism" were relaxed in 1965, but the crime remains punishable by expulsion and resettlement. Also, as a consequence of classification as an administrative offense, this charge carries no right of appeal,¹⁴⁹ which further opens the way for arbitrariness and abuse. Hundreds of innocent people have been administratively sentenced for political reasons to the harsh punishment of exile for a crime of dubious legal validity.¹⁵⁰

145. See generally Vanneman, *supra* note 6, at 286, 291.

146. One egregious example of the latter involved the trials of several people, three of whom were Jews. The indictment charged that the defendants engaged in the illegal buying and selling of foreign currency and gold coins, which was a source of unearned income and furthered the unlawful export of Soviet money and foreign currencies as well as the development of smuggling and speculation in goods. Grzybowski, *Uncensored*, *supra* note 116, at 313-14. These alleged activities, defined as crimes against the state, violated article 88 of the RSFSR Criminal Code, *supra* note 82. Defendants were originally sentenced to prison, but not content with this, the authorities changed the law, and the case was tried by the Supreme Court of the R.S.F.S.R. Meanwhile the law on crimes against the state was amended to permit the death penalty for violations of foreign currency laws. See RSFSR Criminal Code, *supra* note 82, art. 23. Two defendants were subsequently sentenced to death. Thus, the defendants were not tried under the law in force at the time of the alleged offenses, despite the imperative of the nonretroactivity principle in Soviet law. See USSR Judicial Legislation, *supra* note 83, art. 6; USSR Criminal Procedure, *supra* note 83, art. 4. Grzybowski, *Uncensored*, *supra* note 116, at 315. Moreover, the appeal to the Supreme Court was illegal since such cassational appeals are intended by law to be a verification of the legality of the lower court's judgment and not a *de novo* review. Indeed, the Supreme Court's function is to determine only whether the decision was clearly erroneous in light of the materials presented at trial. RSFSR Criminal Procedure, *supra* note 82, art. 332. See also Osakwe, *Due Process*, *supra* note 1, at 291-92. Clearly the trial of these defendants by the R.S.F.S.R. Supreme Court was a trial *de novo* and illegal under Soviet law.

147. RSFSR Criminal Code, *supra* note 82, art. 209; Lapenna, *supra* note 58, at 88.

148. BERMAN, *supra* note 82, at 9-11.

149. Lapenna, *supra* note 58, at 88.

150. *Id.* at 89.

Another vaguely defined crime is hooliganism. As set forth, this crime is an act that constitutes a rude disruption of public order and that manifests a clear disrespect toward society.¹⁵¹ Because this provision allows so many acts to be legally interpreted as offenses, it has become a device that enables law enforcement officials to treat anyone whom they regard as politically or socially dangerous as a criminal offender while preserving the appearance of legality. The provision also enables the authorities to treat as serious offenders those individuals whom they have apprehended incidentally, although the original offenses may have been insignificant or nonexistent.¹⁵²

Law enforcement officials are frequently compelled directly by Party authorities or through the KGB to deal with political dissidents as if they were ordinary criminals, with the result that control of the legal process in these cases rests with the Party or its agents and not with law enforcement agencies.¹⁵³ This practice conflicts with the function of the *prokuratura*, the branch of the Soviet legal profession that oversees the strict and uniform observance of the law in all spheres of Soviet public and social life.¹⁵⁴ Moreover, such discriminatory interference with legal processes violates the equal rights provision of the Soviet Constitution (article 34) as well as article 57, which obligates all public officials to protect the rights and freedoms of all citizens.

The courts have taken a similarly active role in suppressing dissent by assessing the circumstances aggravating criminal responsibility in the cases of dissidents.¹⁵⁵ Courts may consider "other base motives" in determining the accused's degree of responsibility, but like the vague statutory provisions already discussed, this allows for liberal interpretation. One commentator has attempted to define such motives as those "incompatible with communist

151. See RSFSR Criminal Code, *supra* note 82, art. 206. This article has been used to cover a wide variety of offenses despite the "relatively clear definition of hooliganism." Lapenna, *supra* note 58, at 79.

152. Shtromas, *supra* note 53, at 302-03. One example is the case of Igumenov, who was convicted of hooliganism and imprisoned for three years even though he was probably guilty of the lesser offense of intentional infliction of light bodily injury. Lapenna, *supra* note 58, at 79. In response to widespread "deviation" by the courts, however, a decree (*postanovlenie*) of the U.S.S.R. Supreme Court in 1974 called for continued struggle against hooliganism, but at the same time instructed the courts to consider all the circumstances of the offense as well as the character of the accused. The courts also were asked to consider the possibility of conditional sentences and of educating the offender without applying the administrative penalty of detention. *Id.* at 80. Thus, the Soviet Union may be increasingly inclined to show more restraint in bringing the charge of hooliganism. *Id.*

153. Shtromas, *supra* note 53, at 307.

154. CONSTITUTION, *supra* note 2, art. 164. One of the principal functions of the *prokuratura* is to take charge of preliminary criminal investigations. This initial step is taken in order to detect crimes, expose the guilty, ascertain the relevant circumstances of the case, and take crime prevention measures. V. TEREBILOV, *THE SOVIET COURT* 69-74 (1973). See generally Savitski, *Institutions for the Administration of Criminal Justice*, in BASSIOUNI & SAVITSKI, *supra* note 7, at 3, 16-29; Barry, *supra* note 85, at 24-26.

155. See USSR Criminal Legislation, *supra* note 93, art. 34; RSFSR Criminal Code, *supra* note 82, art. 39.

morality." This definition is subject to broad interpretation, however, according to a given court's notion of what it considers to be "incompatible."¹⁵⁶

In addition, trials of dissidents may be conducted in secret by packing the courtroom with KGB agents or militia.¹⁵⁷ This practice violates the requirement of Soviet law that, except in certain types of cases, trials be open.¹⁵⁸ Moreover, freedom of expression and of the press may be curtailed, in violation of article 50 of the Constitution, when authorities prevent the publication of information in the trials of dissidents. The usual technique is to prevent publicity about trials and to publish instead objective reports of tried cases. Information does emerge, however, in the form of *samizdat* (self-published, uncensored) literature, and this source provides evidence that in all politically sensitive cases, guarantees of fairness and legality are ignored.¹⁵⁹

Specific protection for the human rights of dissidents is found primarily in the Covenant on Civil and Political Rights. The practice of Party authorities and the KGB in dealing directly with dissidents outside of the judicial process is inconsistent with article 14(1), which ensures accused persons a fair hearing. This conduct also violates article 26, which guarantees equal treatment before the law to all people, and article 2(3)(a), which ensures an effective remedy to any person whose rights under the Covenant have been violated, including violations resulting from the illegal acts of persons acting in an official capacity. Fairness, equal treatment, and effective remedy cannot be guaranteed where the Party or the KGB takes charge of a case in order to produce an outcome favorable to Party interests.

The flexible application of vague statutory provisions (dissidents' clauses, anti-parasitism, hooliganism) and the consideration of "other base motives" conflict with article 14(3)(a) of the Covenant, which requires that anyone accused of a crime be informed in detail of the nature and cause of the charge. An individual accused of violating such vague statutes is unlikely to comprehend the criminal nature of his or her conduct, further impairing the right to prepare an adequate defense under article 14(3)(b) and (d). Further, the use of special decrees by the Supreme Soviet and lesser state organs is contrary to the nonretroactivity doctrine embodied in article 15. This article states that no one may be found guilty of any act or omission that did not constitute a crime when the questioned conduct occurred and that a heavier penalty may not be imposed than the one applicable at the time of the

156. See Osakwe, *Analysis*, *supra* note 55, at 462-63.

157. Grzybowski, *Uncensored*, *supra* note 116, at 305-06.

158. USSR Criminal Procedure, *supra* note 82, art. 12. The general rule in Soviet procedure provides for public trials, but the law recognizes exceptions, particularly for sex crimes, crimes committed by persons under sixteen years of age, and cases involving intimate personal secrets. Closed trials also are held in cases involving state secrets, but the judgments of the courts must be publicly announced. Savitski, *Criminal Procedure* in BASSIOUNI & SAVITSKI, *supra* note 7, at 45, 51.

159. Grzybowski, *Uncensored*, *supra* note 116, at 305.

offense. Finally, the public hearing provision of article 14(1) requires that the accused be allowed to present his or her case before a "competent, independent and impartial tribunal established by law." To bar public attendance and to prevent release of information in trials of dissidents is to compromise the objectivity of the court. When pressured to produce the result that the State expects, courts established and regulated by law become crude instruments of political power.

Irrespective of these violations of international law, the use of vague statutes and extra-judicial means to repress dissent frustrates the goals of Socialist justice.¹⁶⁰ Confusion is introduced into the legal process through statutes that fail to define offenses clearly, and by reliance on political authority whenever the judicial system is deemed inadequate to produce outcomes desirable to the State. This element of unpredictability contradicts the long-declared intention of the Soviet government to place increasing emphasis on the rule of law¹⁶¹ and perniciously undermines the need for order in an increasingly complex society. A legal system that does not offer consistent standards cannot keep pace with those developments. Indeed, the means chosen to repress dissent in the Soviet Union are likely to retard progress toward Communism by bringing disorder into the intermediate stage of the Soviet Union's transformation. Thus, even the modest advances in human rights achieved in the U.S.S.R. may be negated so that the State's grip on power will not be weakened.

b. *Discrimination in Employment*

Government officials have repeatedly utilized the mechanisms of Soviet labor law to deny employment to dissidents.¹⁶² The scope and variety of these repressive labor practices is very broad. Indeed, Soviet lawmakers have devised means to deny protection against unfair dismissal to increasingly numerous categories of workers whose political loyalties may be questioned.¹⁶³ Additionally, the employment status of domestic personnel (per-

160. See note 7 *supra*. The penal practice in the Soviet Union has been directed at the "over-policing" of political activity but "under-policing" of general delinquency. The former is due to continuing governmental focus on dissent, while the latter has resulted in the failure to properly protect Soviet citizens from crimes against their personal safety, property, and individual rights. Shtromas, *supra* note 53, at 314.

161. See Osakwe, *Due Process*, *supra* note 1, at 270. Cf. Lapenna, *supra* note 58, at 77 (arguing that despite the improvement in the Soviet legal system through codification, deficiencies remain due to lack of a code of administrative procedure and inadequate formulation of legal standards in the field of substantive criminal law).

162. van den Berg, *The Right to Work and Politically Motivated Discrimination in Soviet Labor Law*, 5 REV. SOCIALIST L. 251, 253 (1979) [hereinafter cited as van den Berg].

163. *Id.* at 295.

sons "working for citizens under contract") remains unclear, thereby exposing dissidents who work in this capacity to prosecution for parasitism on the grounds that they lack permanent employment.¹⁶⁴

Discriminatory labor practices also occur in attestation proceedings, which are used to determine the employment fitness of certain scientific personnel, teachers, and all high-ranking persons in the economy. Fitness for employment typically is based on political criteria such as Party membership and participation in political and educational work.¹⁶⁵ Entry into higher educational and managerial positions is controlled by the High Attestation Commission (HAC) which oversees the granting and deprivation of academic degrees and titles. HAC has the authority to deprive a *kandidat* of a degree or title on political grounds alone, which occurs frequently in the cases of dissidents and of Jews wishing to emigrate.¹⁶⁶ The academic community also relies on faculty or university councils to block the rehiring or reelection of "undesirable" teaching staff. Ideology and political training are factors considered in reaching these employment decisions. Frequently, dissidents who fail to be reelected find it nearly impossible to acquire new positions in their chosen professions.¹⁶⁷ These difficulties arise due to the requirement that a notebook recording dismissal for lack of fitness must be presented to prospective employers.¹⁶⁸

Soviet law provides that upon dismissal employees can appeal to higher agencies or to the *prokuratura*. Given the tendency of these institutions to side with management,¹⁶⁹ however, this appeal has proved to be a largely useless act. The courts are inclined to restrict the inquiry to the mere formalities of the dismissal procedure and generally ignore the employee's assertion that the actual grounds for dismissal were political.¹⁷⁰

The use of political criteria for the purpose of employment discrimination is evidence of a Party policy to win the unquestioned loyalty of employees with the concomitant threat of dismissal for disloyalty.¹⁷¹ To enforce this

164. Employment status is difficult to determine in some cases because trade unions may refuse to accept the registration of an employment contract by an employer. If that occurs, no contract exists, and the way is clear for prosecution for parasitism. *Id.* at 262-63. See generally notes 147-150 and accompanying text *supra*.

165. van den Berg, *supra* note 162, at 270. The CPSU is represented in attestation commissions. Its viewpoint is not formally decisive, but the political focus of those proceedings increases the influence of the Party representative's vote in the outcome. The result of attestation hearings is a decision on the fitness of an employee for a particular position; this serves only as a recommendation to the employer. *Id.* at 273-74. Dismissal resulting from an attestation hearing is appealable in the courts, and conclusions of the attestation commission are only one source of evidence. In theory, this rule offers employees some protection from political discrimination, but it is unlikely that the courts have applied it where employees were dismissed for their political views. *Id.* at 275.

166. *Id.* at 276-77.

167. *Id.* at 287.

168. *Id.* at 292.

169. *Id.* at 284.

170. *Id.* at 294.

171. The CONSTITUTION, *supra* note 2, art. 34, which provides for equality of Soviet citizens "in all fields of economic, political, social and cultural life", is conspicuous in its omission of an

policy, pressure is exerted on employers to dismiss dissident employees.¹⁷²

Employment discrimination against dissidents conflicts with Soviet obligations under article 4 of the International Labor Organization Convention on employment discrimination,¹⁷³ which provides for the right of a dismissed employee to appeal the dismissal to an independent "competent body." The Soviet practices also conflict with various provisions of the Covenant on Economic, Social and Cultural Rights. The nondiscrimination clause of article 2(2) provides that the rights guaranteed under the Convention shall apply without regard to political opinion. In particular, every person has the right to work at a freely-chosen occupation (article 6(2)) and to be given an equal opportunity to be promoted in a chosen occupation subject only to considerations of seniority and competence (article 7(c)).

The policy underlying these enumerated rights is the elimination of job discrimination based on political belief, yet the Soviet Union only recognizes political belief which conforms to that of the CPSU. Non-dissident Soviet workers' employment is secured by Soviet domestic law, and such employees do not require the additional protection of these conventions. Only dissident employees stand to benefit from the protection of international law, but it is precisely this group that is denied these rights. In short, the Soviet Union's ratification of the fair employment provisions of these conventions is nothing more than a hollow gesture creating a paper right.

c. *Psychiatric Confinement*

Perhaps the most disturbing human rights violation in the Soviet Union is the silencing of dissent through unlawful psychiatric confinement. This device is both pervasive¹⁷⁴ and effective while not formally violative of the criminal law. The first step toward confinement¹⁷⁵ takes place when officials

anti-discrimination in employment clause. Thus, this article adds nothing to the anti-discrimination protections in labor law. This omission as a constitutional standard suggests that the CPSU intended to enforce a policy of unquestioned political loyalty among certain categories of employees.

172. van den Berg, *supra* note 162, at 296.

173. See note 77 *supra*.

174. Although only a few names are known, it is estimated that individuals confined in this manner number in the thousands. Yeo, *Psychiatry, the Law and Dissent in the Soviet Union*, 14 REV. INT'L COMM'N JURISTS 34, 41 (1975) [hereinafter cited as Yeo]. This device has been used not only against dissidents, but also against Ukrainian nationalists, Baptists, Jews and others. Lapenna, *supra* note 58, at 84.

175. For a detailed discussion of the steps involved in the psychiatric confinement process and the legislation on which this is based, see Young-Anawaty, *International Human Rights Norms and Soviet Abuse of Psychiatry*, 10 CASE W. RES. J. INT'L L. 785, 790-800 (1978) [hereinafter cited as Young-Anawaty]. See also Comment, *Soviet Abuse of Psychiatric Commitment: An International Human Rights Issue*, 9 CALIF. W. INT'L L.J. 629, 636-45 (1979). For accounts of the experiences of dissidents who were psychiatrically confined, see generally H. FIRESIDE, *SOVIET PSYCHOPRISONS* (1979) [hereinafter cited as FIRESIDE]; A. PODRABINEK, *PUNITIVE MEDICINE* (1977). As a result of his study on psychiatric confinement in the U.S.S.R., Podrabinek was sentenced by the Moscow Regional Court to five years' exile under article 190-1 of the RSFSR Criminal Code "for fabrications, damaging to the Soviet state and social system." Amnesty International, *The Podrabinek Trial: Punitive Medicine or Fabrications Known to be*

investigating a criminal case question the mental health of the accused.¹⁷⁶ They may then request a psychiatric diagnosis of the accused by a psychiatric commission. If the commission finds that the defendant is suffering from a mental illness or was mentally incapacitated at the time the alleged crime was committed, criminal proceedings must be suspended and the diagnosis presented to a court. The court then decides if the accused must be confined on a compulsory basis for medical reasons.¹⁷⁷ Throughout this process the individual is deprived of all procedural rights established by Soviet law for persons charged with committing crimes.¹⁷⁸ If the court finds that the accused was correctly determined by the psychiatric commission to be mentally ill at the time of the alleged offense, it releases the accused from criminal responsibility or punishment¹⁷⁹ and may order commitment for medical treatment.¹⁸⁰ The defendant then will be sent either to an ordinary psychiatric hospital if not considered socially dangerous, or to a "special" psychiatric hospital reserved for persons who "represent a special danger for society."¹⁸¹ Once in a psychiatric hospital, inmates have no procedural means of protesting treatment and conditions. Furthermore, neither patients nor their relatives have a voice in choosing the attending psychiatrist, the methods of treatment, or even the right to see medical reports. Changes in political views are closely observed by a psychiatrist, and inmates may be

False. . . ? 1 (British Section, Tower House, 8/14 Southhampton Street, London WC2E 7HF). See note 83 *supra*.

176. See RSFSR Criminal Procedure, *supra* note 82, art. 184.

177. RSFSR Criminal Code, *supra* note 82, arts. 58, 59; RSFSR Criminal Procedure, *supra* note 82, art. 188. Although Soviet courts are intended to be autonomous, in cases with political overtones they revert to the political role for which they were created in the Stalinist era. Yeo, *supra* note 174, at 38.

178. Yeo, *supra* note 174, at 35. An accused whose sanity is questioned need be told neither that an order for examination has been issued nor the results of the examination. The investigation officials are not required to inform the accused of new charges or of documentation in the case. It is also in the court's discretion whether the accused and/or his or her relatives can attend the court hearing regarding sanity and confinement, and the date of the hearing need not be disclosed. Finally, a public hearing is not required in many Union Republics, such as the Russian Republic. *Id.*

One example of the arbitrariness of this procedure is the case of Yakhimovich, a Communist official highly praised as a collective farm chairman until "he began spreading slanderous and defamatory statements blaming the Soviet government and social system." Nothing abnormal could be discovered about Yakhimovich's behavior, except for his political dissidence. Nevertheless, he was found to show "development of a paranoid system in a psychopathic personality," and was confined to a mental hospital. Young-Anawaty, *supra* note 175, at 807, n.86.

179. RSFSR Criminal Code, *supra* note 82, art. 11. In so doing, the courts are purporting to apply the rules of nonimputability to these individuals who at the time they committed "socially dangerous" acts did not realize the significance of their acts nor correctly govern their conduct because of mental illness. Lapenna, *supra* note 58, at 84. See also Osakwe, *Analysis*, *supra* note 55, at 451-53.

180. RSFSR Criminal Procedure, *supra* note 82, art. 410. See Young-Anawaty, *supra* note 175, at 795-96.

181. RSFSR Criminal Code, *supra* note 82, arts. 59 & 60. See Young-Anawaty, *supra* note 175, at 39-40.

pronounced "cured" only when they reject their dissident views and agree to conform.¹⁸²

The psychiatric confinement of dissidents violates numerous internationally protected human rights. This practice also evidences the Soviet Union's failure to live up to the principles of the Helsinki Final Act of promoting and encouraging the effective exercise of civil and political rights.¹⁸³ In particular, abuses in the psychiatric treatment of dissidents eviscerates significant guarantees under the Covenant on Civil and Political Rights, including the right to liberty and security of person (article 9(1)), the right to freedom of thought, conscience, and religion (article 18), and the right to hold opinions without interference (article 19). It also endorses disrespect for the prohibition against torture¹⁸⁴ and cruel, inhuman, or degrading treatment or punishment (article 7). These practices leave little force and effect in the government's obligation to treat all persons with humanity and respect (article 10(1)).

No one can seriously maintain that the punctilious legal proceedings leading to psychiatric confinement are intended to provide humane treatment for embattled dissidents. Indeed, the State protects itself by creating a smoke-screen for the secret character of such hearings.¹⁸⁵ If protest against the Soviet system is, in fact, a form of mental illness, the State should not fear the public expression of dissidents' views. Party officials who justify their authority on the grounds of a higher consciousness of society's needs¹⁸⁶ should welcome the opportunity to enlarge public understanding through open dispute with dissidents. Such debate should readily expose the purportedly misguided views of dissidents, show them not to be socially dangerous, and make them amenable to reeducation. The fact that criticism is stifled through psychiatric confinement carries the opposite implication—that dissidents may spread their just discontent to others. The underlying reason for psychiatric confinement may, therefore, be to conceal deficiencies

182. Yeo, *supra* note 174, at 39-40.

183. See notes 35-41 and accompanying text *supra*. From May 24 to June 1, 1980, a committee of experts sponsored by the International Institute for Higher Studies in Criminal Sciences, Siracusa, Sicily, considered a Draft Body of Principles for the Protection of Persons Suffering from Mental Disorder. When drafting is completed, this document will be presented to the United Nations for adoption. Information can be obtained from the International Commission of Jurists, P.O. Box 120, 109 Route de Chêne, 1224 Chêne-Bougeries, Geneva, Switzerland.

184. Torture has been defined as conduct on the part of a public official by which severe pain or suffering, whether physical or mental, is inflicted on the victim either to obtain a confession or to intimidate, discredit or humiliate, or as a form of unlawful punishment. Unlawful psychiatric confinement as practiced in the Soviet Union falls within the scope of this definition and is accordingly prohibited. See Draft Convention for the Prevention and Suppression of Torture, February 1, 1978, U.N. Doc. E/CN. 4/NGO 213. For a discussion of the historical use of torture as a device to suppress political opposition, see generally Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 REVUE INT'LE DE DROIT PÉNAL 29-31 (1977).

185. Yeo, *supra* note 174, at 35.

186. See note 5 *supra*.

in the socialist system. In any event, the issue of freely expressed disagreement with the State is itself foreclosed from public scrutiny. Far from acting consistently with official doctrine, the Soviet government deems it necessary to send thousands through legitimized procedures to these gas chambers of the human spirit.¹⁸⁷

d. *Conditions of Imprisonment*

Equally abhorrent as the human rights violations associated with psychiatric confinement are those which result from the conditions of imprisonment. The treatment of dissident prisoners is governed primarily by the Principles of Corrective Labour Legislation¹⁸⁸ and by the Corrective Labor Codes that are based on these Principles.¹⁸⁹ In addition, the Rules of Internal Order further strengthen federal control over the actual operation of the penitentiary system.¹⁹⁰ These rules have not been published, but originate, with doubtful legal validity according to one commentator, in article 5 of the Corrective Labour Legislation.¹⁹¹

Under Soviet penitentiary law, the Soviet Ministry of Interior has authority to locate those serious offenders entrusted to the Ministry, particularly political prisoners, in prison facilities. Special hardship falls on political prisoners from smaller Union Republics who may be placed thousands of miles away from their homeland in Russian or Siberian camps among predominantly Russian camp populations.¹⁹²

Evidence in *samizdat* literature indicates that prison camp administrators do not comply with laws intended to govern their conduct. Although prison officials attempt to justify maltreatment of prisoners mainly by asserting that it is permitted under the Rules of Internal Order, such treatment, as one commentator states, "is characterized by systematic cruelty and by brutalization, intimidation and humiliation of prisoners, in particular political prisoners."¹⁹³ The purpose of these abuses, in the extreme, is "to make life literally impossible" for dissident prisoners.¹⁹⁴ Clearly, this approach to penology is incompatible with the present official program of the CPSU to replace eventually all forms of criminal punishment with resocialization and educational measures.¹⁹⁵

187. See FIRESIDE, *supra* note 175, at 11.

188. See Fundamentals of Corrective Labour Legislation of the USSR and the Union Republics [hereinafter cited as Corrective Labour Legislation] in SAIFULIN, *supra* note 74, at 301. See generally Shupilov, *Execution of Sentences* in BASSIOUNI & SAVITSKI, *supra* note 7, at 177-99 [hereinafter cited as Shupilov].

189. See Feldbrugge, *Soviet Penitentiary Law*, 1 REV. SOCIALIST L. 123 (1975) [hereinafter cited as Feldbrugge, *Penitentiary*].

190. *Id.* at 129.

191. See note 188 *supra*; Feldbrugge, *Penitentiary*, *supra* note 189, at 129.

192. Feldbrugge, *Penitentiary*, *supra* note 189, at 129.

193. *Id.* at 132.

194. *Id.*

195. See Corrective Labour Legislation, *supra* note 188, art. 1; RSFSR Criminal Code, *supra* note 82, art. 20. See also Shupilov, *supra* note 188 at 180.

One of the most frequently reported abuses is the imposition of unreasonable or excessively severe¹⁹⁶ penalties by prison authorities. There also are reports that work assignments to prisoners violate the laws governing the protection of health and labor safety.¹⁹⁷ In addition, incoming correspondence to prisoners is censored despite their right to receive letters without any apparent restriction on number.¹⁹⁸ Prison censorship officials obviously assume authority to withhold letters deemed to have a "negative influence" on prisoners.¹⁹⁹ Moreover, the number of letters prisoners can send out is carefully controlled.²⁰⁰ Political prisoners, for example, are allowed to send only one letter per month.²⁰¹ Thus, despite the protection of Soviet law, the right to correspondence is quite accurately described by *samizdat* reports as drastically curtailed or reduced to nothing.²⁰²

Even greater restrictions are imposed on the right of prisoners to receive visits of long and short duration, for cancellation of visits is one of the most frequently applied disciplinary measures. Further, while the Corrective Labour Legislation²⁰³ permits prisoners to order books and periodicals published in the U.S.S.R. within certain limitations,²⁰⁴ the Rules of Internal Order effectively penalize prisoners by prescribing a more restrictive list of articles and goods which they may possess.²⁰⁵ Thus, the Corrective Labour

196. Feldbrugge, *Penitentiary*, *supra* note 188, at 133. The range and severity of penalties that can be imposed on persons deprived of liberty is governed by Corrective Labour Legislation, *supra* note 188, art. 34.

197. Feldbrugge, *Penitentiary*, *supra* note 189, at 133. The labor conditions for persons serving prison sentences are governed by Corrective Labour Legislation, *supra* note 188, art. 28. These include an eight-hour work day six days a week, release from work on holidays, and observance of safety rules as provided for by the labor laws. *Id.*

198. Feldbrugge, *Penitentiary*, *supra* note 189, at 133. The Corrective Labour Code permits censorship of "prisoners' correspondence" and is interpreted to include incoming mail. *Id.* This practice appears to conflict with Corrective Labour Legislation, *supra* note 188, art. 26, which provides that "[c]onvicted persons shall be allowed to receive letters without restriction."

199. Feldbrugge, *Penitentiary*, *supra* note 189, at 133.

200. See Corrective Labour Legislation, *supra* note 188, art. 26.

201. Feldbrugge, *Penitentiary*, *supra* note 189, at 133.

202. *Id.*

203. *Id.* The right to receive visits is provided under Corrective Labour Legislation, *supra* note 188, art. 24. This article provides for brief or prolonged visits in varying numbers depending on the regimen imposed on the convict by the sentence. It also provides for additional visits for "good behavior and a conscientious attitude to work." *Id.* *Samizdat* reports suggest, however, that procedures for visitation are instituted which are intended to harass visitors or to be invoked as a pretext for not admitting them. Feldbrugge, *Penitentiary*, *supra* note 189, at 133. Cf. Corrective Labour Legislation, *supra* note 188, art. 34 (providing for deprivation of a regular visit as a disciplinary measure).

204. Feldbrugge, *Penitentiary*, *supra* note 189, at 134. Corrective Labour Legislation, *supra* note 188, art. 25 provides that "convicted persons shall be allowed to receive not more than two parcels of printed matter a year and also to buy literature through the book trading network without restriction." Nevertheless, intense disagreements have arisen between prison personnel and Baptist prisoners who attach great importance to possession and reading of the Bible. Feldbrugge, *Penitentiary*, *supra* note 189, at 134.

205. Feldbrugge, *Penitentiary*, *supra* note 189, at 134.

Legislation could permit possession of certain items which the list nevertheless forbids. Officials who base their authority on the list thereby violate the higher norm of the Corrective Labour Legislation.

Samizdat literature also has reported that prison officials have assumed power to censor complaints and to penalize prisoners for "slandering" prison personnel and for other infringements incidental to complaints.²⁰⁶ Another persistent abuse is denial of the right of prisoners to receive food, which creates a serious hunger and malnutrition problem.²⁰⁷ Finally, prisoners are broadly entitled to medical care,²⁰⁸ but even the best care available is inadequate, and physicians themselves, if not simply incompetent, have been characterized as "maliciously negligent."²⁰⁹

The penal practice of the Soviet Union is primarily governed under international law by the Covenant on Civil and Political Rights.²¹⁰ In particular, prison administrators who discriminate against prisoners for their religious, political, or other opinions violate article 2(1). Prisoners who are subjected to maltreatment and illegal forms of punishment are denied their rights under article 7. The rights of prisoners to liberty and security of person also are not respected under article 9(1), nor are they treated with humanity and respect in accordance with article 10(1). It is also apparent that the conduct of prison officials has been aimed at punishment of prisoners, rather than at rehabilitation, as required by article 10(3). Finally, so long as arbitrary and abusive

206. *Id.*

207. *Id.* at 134-35. The Corrective Labour Code requires that prisoners receive nourishment sufficient to function normally. The problem of obtaining adequate nourishment is intensified for prisoners, who are usually assigned to hard labor. Food supplies are marginally adequate; indeed, *samizdat* reports indicate that the amount distributed may be below the legally required scale and that the food is frequently inedible. The resulting undernourishment may damage the prisoner's health and prevent him from completion of the work load requirement. This may lead to a punitive lower diet and thereby create a very destructive cycle. Feldbrugge, *Penitentiary*, *supra* note 189, at 135.

208. Corrective Labour Legislation, *supra* note 188, art. 37.

209. Feldbrugge, *Penitentiary*, *supra* note 189, at 135.

210. See note 26 *supra*. See also Rules *supra* note 98. Many obligations under the Covenant on Civil and Political Rights are also set forth as non-binding principles in the Rules. These and others can be summarized as follows:

Rule 11: Adequate light and fresh air for living and working must be provided.

Rule 20: Adequate food to maintain health and strength must be provided.

Rule 22: Prisoners shall have medical services by qualified physicians.

Rule 30: No punishment is to be imposed except in accordance with law.

Rule 31: Corporal punishment is completely forbidden.

Rule 33: Instruments of restraint are prohibited except in certain circumstances for maintaining order.

Rule 36: Prisoners have the right to make complaints without censorship or reprisal.

Rule 37: Prisoners have the right to communicate with the outside world.

Rule 40: All prisons are to have libraries stocked with recreational and instructional books.

Rules 41 and 42: Free exercise of religion is guaranteed.

treatment of prisoners continues, Soviet officials will have failed to respect the right of individuals everywhere to be recognized as persons before the law (article 16).

It scarcely needs mentioning that the effect of human rights violations in Soviet penitentiary practice is to undermine the correctional and educational purposes of corrective labor legislation in the U.S.S.R.²¹¹ Thus, there is a weakening of legality within a crucial institution of the criminal justice system. The Soviet government would be acting in its own interests by ensuring that domestic laws and human rights obligations are rigorously observed in its prisons.

CONCLUSION: STRATEGIES TO IMPLEMENT HUMAN RIGHTS IN THE SOVIET UNION

Several proposals can be formulated to promote greater Soviet compliance with the international human rights program. First of all, public protest should intensify in order to focus world public opinion on human rights violations in the U.S.S.R.²¹² Secondly, the West should openly support Soviet jurists who defend dissidents and private citizens who speak out against human rights violations, thereby strengthening the resolve of these individuals to stand firmly in their claims.²¹³ This strategy will have even greater effect if public figures intervene and lend their support. Thirdly, international professional and governmental organizations should urge the U.S.S.R.

211. The rational organization of labor is essential for the correction and reeducation of convicts. In addition to these goals, corrective labor law fulfills the traditional function of punishment for criminal acts. The legislative basis of corrective labor law is found in the CONSTITUTION, *supra* note 2, art. 14, which asserts that "labour, free from exploitation" is essential to "the growth of social wealth and of the well-being of the people," and art. 60, which states that "every able-bodied" person has the duty "to work conscientiously" in a freely-chosen field of "socially useful" work. Shupilov, *supra* note 188, at 179-80.

212. See Young-Anawaty, *supra* note 175, at 814; Pettiti, *supra* note 56, at 296. One example of the positive effects of world public opinion occurred in 1961. Soviet legislation was enacted for the prosecution of economic crimes. More than 200 Jews were sentenced to death and executed under this statute. Although Jews made up only 1.2% of the population, 90% of those executed were Jews. These executions ceased after public pressure was exerted through the United Nations. Likewise, Jews were forbidden from baking unleavened bread (*matzot*) at Passover by Khrushchev, but this prohibition also ceased after protest at the U.N. Rosenne, *Some Legal Aspects of the Struggle for the Rights of Jews in the Soviet Union*, 9 ISRAEL L. REV. 588, 589-90 (1974) [hereinafter cited as Rosenne]. Another instance occurred when the Soviet Union imposed a "diploma tax" on all Jewish graduates from institutions of higher learning in 1972. The pressure of world public opinion forced it to abolish the tax within less than one year. Dinstein, *Science, Technology and Human Rights*, 5 DALHOUSIE L.J. 155, 165 (1979). Finally, Western nations expressed disapproval of the trials of Soviet citizens who monitored the U.S.S.R.'s compliance with the Helsinki Final Act. See notes 35-41 and accompanying text *supra*. Great Britain refused to move forward with a bilateral supporting agreement with the Soviets, and the United States postponed the sale of oil and computer technology. Turack, *supra* note 38, at 606 n.110.

213. See Feldbrugge, *Penitentiary*, *supra* note 189, at 136.

to amend its domestic laws in a manner that would be compatible with Soviet goals and yet safeguard the rights of ethnic minorities and dissidents. The Soviet Union would thereby comply with its international obligations and appear more credible to the world community.²¹⁴

The human rights movement is characterized by the gradual elevation of the individual under international law from an object of the law to a subject.²¹⁵ Thus, fundamental human rights exist that transcend the principle of national sovereignty. Through ratification of the major human rights documents, the Soviet Union has in principle committed itself to participation in this process. The democratic nations of the world, aside from devoting greater attention to protection of human rights in their own legal systems, should, as an expression of their shared values, continue to demand that the Soviet Union recognize and protect the basic human rights of all individuals subject to its law.

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214. The binding nature of the international human rights instruments imposes a duty on the co-signatories not only to fulfill their own obligations within their jurisdictions, but also to take a legitimate interest in gaining respect for all common undertakings. The fact that a state undertakes to maintain the human rights of its citizens does not justify derogation from fundamental obligations under international law. Robertson, *Helsinki*, *supra* note 12, at 42. *See also* Rosenne, *supra* note 212, at 589. *See generally* Signatures, *supra* note 12. *But see* Blishchenko, *supra* note 12, at 820 (arguing that ratification of a treaty or convention should be treated as domestic legislation enacted under the authority of the state as sovereign and therefore subject to repeal). Other commentators respond that continued Soviet resistance to Western pressure to comply with human rights norms is a breach of its obligations under international law. *See* Hazard, *Tactics*, *supra* note 15, at 27-29. *See also* Hazard, *The Future of Soviet Law*, 8 SYDNEY L. REV. 590, 597-98 (1979). The author states that "the Soviet law of the future will reflect a new balance between freedom and restraint," but that the Soviet leadership will not accept the obligations of the U.N. Covenants that they find to be incompatible with their policies. *See* notes 26-30 *supra*.

215. *See* Higgins, *Conceptual*, *supra* note 9, at 13-14; van Dijk, *supra* note 9, at 1550.